# 2018 Utah Prosecution Council Spring Conference

# CRIMINAL CASE LAW UPDATE[1]

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1 Thanks to Dan Schweitzer, Supreme Court Counsel, National Association of Attorneys General, for his synopses of U.S. Supreme Court decisions.

## APPELLATE PROCEDURE

**A complete restitution order made as part of a plea in abeyance is a final order and may be appealed as of right; court-ordered restitution orders are not, and may not be separately appealed.**

State v. Moores & Becker, 2017 UT 36 (Himonas). Moores and Becker both entered pleas in abeyance that included restitution orders. The State had argued that because pleas in abeyance are not final orders, they could not challenge the restitution orders. The Supreme Court disagreed, holding that complete restitution orders are separately final and appealable. But the court explained that court-ordered restitution orders as part of pleas in abeyance were different and not separately appealable because they are conditions of the plea.

**A defendant challenging a restitution order by means of a 60(b) motion may only appeal the denial of 60(b) relief, not the underlying order.**

State v. Speed, 2017 UT App 176 (Roth). Speed was convicted of stealing a bunch of cell phones and faced a six-figure restitution amount. He did not file a motion requesting a restitution hearing until after he was convicted, sentenced, and on probation. He then filed a rule 60(b)(4) motion claiming that the order was void for lack of jurisdiction because the court relied on incomplete information and did not hold a hearing; that he lacked notice; and that his counsel was ineffective. But these assertions of legal error during the sentencing process did not, even if true, deprive the court of jurisdiction. The order was thus not void and the trial court did not abuse its discretion by refusing to grant relief on that basis.

**A defendant's argument that a statutory term is inapplicable to his conduct preserves an argument that the statute is unconstitutionally vague.**

State v. Garcia, 2017 UT 53 (Pearce). Garcia argued in the trial court that the evidence was not sufficient to prove that he was an unlawful user of a controlled substance at the time he possessed a gun because there was no drug test or evidence of drugs on his person—merely a statement that he "doe[s] a lot of cocaine, like, sometimes." On appeal, he argued that the term "unlawful user" was unconstitutionally vague. The State argued that the constitutional argument was unpreserved, but the Utah Supreme Court disagreed, holding that the issue of the statute's proper interpretation was preserved, and the constitutional argument was merely an unexpressed subset of the larger statutory argument.

**Appellate courts will not review a lower court's decision if the appellant does not challenge the basis of the lower court's decision on appeal.**

State v. Gollaher, 2017 UT App 168 (Pohlman). Gollaher was charged with sodomy on a child and sexual exploitation of a minor. When the U.S. Department of Justice informed Gollaher that it would limit the testimony its agents could present at his preliminary hearing in response to his subpoenas, and when Gollaher's trial counsel refused to show pornographic images to Gollaher's child–victim on the stand at the preliminary hearing, Gollaher filed a petition for extraordinary relief. The district court denied the petition because Gollaher had other plain,

speedy, and adequate remedies: he could challenge the DOJ policy decision in federal court, and he could wait until he was bound over and file an interlocutory appeal. On appeal from the denial of his extraordinary relief petition, Gollaher argued the merits of his petition but did not address the basis for the district court's rejection of the petition, so the court affirmed.

**When a trial court bases its ruling on independent alternative grounds, appellants must challenge each ground on appeal.**
**State v. Paredez, 2017 UT App 220 (Toomey).** An officer pulled over a car for traffic violations. After arresting the driver and determining that the car must be impounded, the officer went to speak with Paredez, the passenger. The officer opened the passenger door and saw a meth pipe in plain view sticking out of Paredez's pocket. In denying a motion to suppress, the court ruled that it was reasonable for the officer to speak with Paredez to see if he would corroborate the driver's story. Alternatively, the court ruled that the officer would have inevitably discovered the pipe because the officer had to impound the car so Paredez would have had to get out and the pipe would have been visible. Paredez challenged the first basis on appeal but not the second, so the court affirmed.

**Appellate courts should not consider claims that are presented for the first time in petitions for rehearing.**
**State v. Goins, 2017 UT 61 (Pearce).** Goins appealed his conviction and lost in the court of appeals. He petitioned for rehearing and raised several new claims. Rule 35, Utah Rules of Appellate Procedure, allows appellate courts to grant a rehearing when they have "overlooked or misapprehended" a point of law or fact. The supreme court held that rule 35 does not allow a party to present new theories or contentions. The one time the court has allowed a party to do so is when both parties agreed that there was reversible error.

**The court of appeals has authority to overrule its own precedent.**
**State v. Legg, 2018 UT 12 (Himonas).** Legg appealed the revocation of his probation, but he completed his sentence before the court of appeals decided the merits of the case. In dismissing the appeal as moot, the court overturned two of its prior cases. The supreme court held that the court of appeals has authority to overturn its own precedent using the factors in *Eldridge v. Johndrow*, 2015 UT 21—the persuasiveness of the prior precedent and how firmly it is established.

**Collateral consequences are not presumed when determining whether a probation revocation is moot.**
**State v. Legg, 2018 UT 12 (Himonas).** Legg appealed the revocation of his probation, but he completed his sentence before the court of appeals decided the merits of the case. The court of appeals dismissed the appeal as moot, and the supreme court affirmed. Unlike a criminal conviction, collateral consequences are not presumed for probation revocations. A defendant must show actual, probable, legal collateral consequences to overcome the State's prima facie showing of mootness.

**Inconsistent verdicts do no provide an independent basis to reverse a conviction.**
State v. Cady, 2018 UT App 8 (Mortensen). Cady digitally penetrated the vagina of his wife's friend when she was sleeping over. Five minutes later, he had sex with her. The jury convicted him of object rape but acquitted him of rape. Cady argued that the verdicts were inconsistent and justified reversal. But courts will not reverse simply based on inconsistent verdicts. In any event, the verdicts were consistent. Acquittal on rape charge did not mean that the victim consented; it meant only that the State did not prove non-consent or some other element beyond a reasonable doubt. Even so, a victim could reasonably refuse consent for one activity, then later consent to a different activity.

**The exceptional circumstances exception to preservation requires a rare procedural anomaly that either prevented an appellant from preserving an issue or excused a failure to do so, plus several factors must justify reaching the issue. This doctrine does not give the court authority to reverse on an unpreserved issue that was not raised on appeal, though the court has limited discretion to do so under some circumstances.**
State v. Johnson, 2017 UT 76 (Durham). Johnson was convicted of murder. He requested and proposed an instruction for the LIO of homicide by assault. The homicide by assault instruction was flawed, but Johnson did not raise that issue on appeal. The court of appeals asked for supplemental briefing on the issue and reversed on the un-argued basis of the erroneous LIO instruction, justifying its decision under the exceptional circumstances exception to the preservation rule. The supreme court reversed. It held that exceptional circumstances do not justify reaching an issue that was not raised by either party on appeal. Rather, the appellant must show a rare procedural anomaly that prevented him from preserving the issue or excused his failure to do so, and that several factors justify reaching the unpreserved issue. However, the court identified several rules for determining when it may *sua sponte* reverse based on an unpreserved claim not raised on appeal.

## ATTORNEY OVERSIGHT AND DISCIPLINE

**The office of professional conduct (OPC) bears the burden of proving misconduct allegations by a preponderance of evidence in most cases; a clear and convincing standard applies to motions for interim suspension**
In the Matter of the Discipline of Brian W. Steffensen, 2016 UT 18 (Lee). Steffensen, an attorney, was charged with misconduct for engaging in tax fraud and related offenses. The standard for proving violations of the rules of professional conduct is preponderance of the evidence. Steffensen argued that due process entitled him to hold OPC to the beyond-a-reasonable-doubt standard. The trial court disagreed. The Utah Supreme Court granted interlocutory appeal and agreed with the trial court that Utah Rule of Judicial Procedure 14-517 correctly stated a preponderance standard.

## CIVIL RIGHTS

**A Bivens suit may not be based on condition-of-confinement claims.**
**Ziglar v. Abbasi, 15-1358 (Kennedy).** By a 4-2 vote, the Court held that the Bivens damages remedy should not extend to condition-of-confinement claims asserted against high executive branch officials based on a formal policy they adopted with respect to the detention, in the immediate aftermath of the September 11th terrorist attacks, of certain aliens arrested on immigration charges. By the same 4-2 vote, the Court vacated the Second Circuit's ruling allowing a Bivens claim to proceed against a warden who allegedly allowed prison guards to abuse the detained aliens. The Court remanded to allow the Second Circuit to assess whether "special factors" support not extending Bivens to this slightly new context. Finally, the Court held that all the defendants are entitled to qualified immunity from the detained aliens' claim under 42 U.S.C. §1985(3), which authorizes damages actions against persons who conspire to deprive others of the equal protection of the law. The Court concluded that the law was (and is) unclear whether "officials employed by the same governmental department . . . conspire when they speak to one another and work together in their official capacities."

**Excessive-force claims may not proceed under a theory that a police officer's otherwise use of lawful force stemmed from an independent Fourth Amendment violation.**
**County of Los Angeles v. Mendez, 16-369 (Alito).** By an 8-0 vote, the Court rejected the Ninth Circuit's "provocation" rule, under which a police officer may be held responsible for an otherwise reasonable use of force if the officer provoked the violent confrontation and the provocation was itself an independent Fourth Amendment violation. The Court stated that the "rule's fundamental flaw is that it uses another constitutional violation to manufacture an excessive-force claim where one would not otherwise exist."

**An officer who shoots a knife-wielding woman standing six feet away from another woman, when the knife-wielder refuses to acknowledge police or drop the knife, does not clearly violate the Fourth Amendment.**
**Kisela v. Hughes, 17-467 (per curiam).** By a 7-2 vote, the Court summarily reversed a Ninth Circuit decision that had denied qualified immunity to a police officer who was sued by woman (Hughes) he shot after the woman, "holding a large kitchen knife, had taken steps toward another woman [Chadwick] standing nearby, and had refused to drop the knife after at least two commands to do so." The Court concluded that the officer was entitled to qualified immunity because "[t]his is far from the obvious case in which any competent officer would have known that shooting Hughes to protect Chadwick would violate the Fourth Amendment." The Court faulted the Ninth Circuit for failing to recognize that and for relying on circuit precedents that involved very different situations or were decided after the incident at issue.

**A successful prisoner litigant has to pay up to 25% of his award to satisfy attorney's fees.**
**Murphy v. Smith, 16-1067 (Gorsuch).** The Prison Litigation Reform Act provides that, when a prisoner obtains a money judgment in a §1983 action and is awarded attorney's fees, "a portion

of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant." 42 U.S.C. §1997e(d)(2). By a 5-4 vote, the Court held that this provision "mean[s] that the court must pay the attorney's entire fee award from the plaintiff's judgment until it reaches the 25% cap and only then turn to the defendant." In so ruling, the Court rejected the prisoner-plaintiff's contention that the provision "allow[s] the district court discretion to take any amount it wishes from the plaintiff's judgment to pay the attorney, from 25% down to a penny."

## CRIMINAL LAW

**Ake v. Oklahoma clearly established that indigent defendants are entitled to a neutral mental health expert, not one that can communicate with the court and prosecutor.**
**McWilliams v. Dunn, 16-5294 (Breyer).** The Court held by a 5-4 vote that petitioner was entitled to habeas corpus relief because Alabama failed to provide what Ake v. Oklahoma, 470 U.S. 68, 83 (1985), clearly established: "that, when certain threshold criteria are met, the State must provide an indigent defendant with access to a mental health expert who is sufficiently available to the defense and independent from the prosecution to effectively 'assist in evaluation, preparation, and presentation of the defense.'" In so holding, the Court declined to resolve whether Ake requires a state to "provide an indigent defendant with a qualified mental health expert retained specifically for the defense team, not a neutral expert available to both parties." The Court found it unnecessary to reach that issue because it concluded that the state failed to provide petitioner with an expert (neutral or otherwise) who could assist the defense in evaluating another expert's report and in preparing and presenting arguments that could respond to it.

**A sex abuse victim's testimony is not inherently improbable just because it contains some inconsistencies or adds detail over time.**
**State v. Ray, 2017 UT App 78 (Orme).** Ray was charged with various sex offenses involving a fifteen-year-old girl whom he romanced with, among other things, rose petals, a vibrator, and watching Twilight: New Moon while naked together. Shortly after the abuse, the victim went into a coma and was hospitalized. She told her sister, then a detective, about the abuse. She also testified at trial. Her accounts had some inconsistencies, but that is to be expected, and mere inconsistencies or additions of detail over time do not render a witness's testimony inherently improbable under *State v. Robbins.*

**Plea bargains can be withdrawn if a plea has not yet entered, so long as there is no detrimental reliance.**
**State v. Francis, 2017 UT 49 (Pearce).** Francis and the State agreed to a plea bargain the weekend before the scheduled trial. On the day of trial, the State spoke with the victim, who objected to the proposed resolution. The State then withdrew the offer before Francis pled. Francis filed a motion to enforce the plea agreement, which the trial court denied. The court of appeals granted interlocutory review and certified the case to the Utah Supreme Court. The

supreme court affirmed, holding that plea bargains may be withdrawn before entry of a plea, so long as there is no detrimental reliance (which Francis had not shown here).

**A plea is unknowing when the defendant bases his plea on a promise but is unaware of the actual value of that promise due to misrepresentations by the prosecutor—regardless of whether the misrepresentations are intentional.**
**State v. Magness, 2017 UT App 130 (Mortensen).** Magness pleaded guilty to rape. The prosecutor told Magness that the victim was not seeking prison. As part of the plea agreement, the prosecutor agreed to recommend probation unless the victim changed her mind. When the victim later said she never told the prosecutor that she didn't want Magness to go to prison, Magness moved to withdraw his plea. The court of appeals held that the district court erred in denying his motion because it focused on the Rule 11 colloquy (rather than the totality of the circumstances) and the lack of any intentional misrepresentation by the prosecutor. But the prosecutor's intent was immaterial. Magness relied on the prosecutor's statement that the victim said she was not seeking prison, the statement wasn't true, and the misrepresentation precluded Magness from "knowingly assessing the likelihood of securing leniency."

**For retaliation against a witness, victim, or informant, the threat need not be communicated to the person.**
**State v. Trujillo, 2017 UT App 116 (Orme).** When police arrested Trujillo, a gang leader, for aggravated assault arising out of a confrontation with some neighbors, Trujillo said someone would have to "pay," and that "my boys will be paying [the neighbors] a visit . . . and it's [the officers'] fault." Trujillo added, "Do you expect me to go to . . . jail and nothing happen?" That constituted a threat directed *against* a witness, victim, or informant, even though the neighbors were not present to hear it.

**Constructive possession does not require exclusive possession.**
**State v. Vu, 2017 UT App 179 (Orme).** After observing five controlled buys with a confidential informant and tracking Vu's use of an Altima, officers obtained a search warrant for the Altima and the apartment where three of the buys took place. They found a gun hidden behind a panel in the center console of the Altima, and they found Vu in a room in the apartment, using meth, with a distributable amount of meth near him. Vu owned neither the Altima nor the apartment. But the State presented evidence that the owner of the Altima informally leased the Altima to Vu, that Vu installed a stereo system in it, that officers had seen Vu drive the Altima and had tracked it regularly going to the apartment where Vu stayed, and that the informant had seen Vu remove drugs from the same hidden compartment and saw the gun there as well. The State also presented evidence that for a couple months, Vu had been staying in the apartment from which he sold meth; that although there were four others in the apartment, Vu was the only one in the room with the meth; and that there was mail and a casino card with Vu's name on it in the room. That was enough to prove that Vu had both the power and intent to exercise dominion and control over the drugs and gun.

**An accomplice must have the mental state required for principal offense, her conduct must be directed at committing the principal offense, and her mental state must relate to the results of her conduct.**

State v. Grunwald, 2018 UT App 46 (Hagen). Grunwald drove her truck while her boyfriend shot and killed one officer and shot at several others. Grunwald was charged as an accomplice. The jury instructions mistakenly included a recklessness component when the principal offense did not allow for recklessness. The instructions also said that Grunwald could be convicted for intentionally aiding her boyfriend "who" committed the offense—rather than "to" commit the offense. And the instructions said Grunwald only needed to know that her boyfriend's conduct could result in the crimes, rather than saying that she had to be aware that her conduct could result in her boyfriend committing the crimes. The instructions had the effect of lowering the burden of proof, and there was no strategic reason not to object here. Counsel was deficient for not objecting, but Grunwald only suffered prejudice on some of her convictions.

## CRIMINAL PROCEDURE

**The State does not violate mandatory joinder under the single criminal episode statute by prosecuting a defendant separately for crimes that involve different victims and have different criminal objectives.**

State v. Rushton, 2017 UT 21 (Himonas). Rushton ran an internet business. To keep his business afloat, he stopped withholding his employee's taxes from their wages, and then eventually stopped paying his employees altogether. He was first prosecuted for tax fraud and convicted. The State then brought charges for the wage theft. Rushton argued that the mandatory joinder statute required that all of these charges be brought together. The Supreme Court disagreed, holding that the objective for each set of crimes was different when evaluated in the totality of circumstances (victims, purposes, time, and ability to make a conscious and knowing decision to engage in other criminal activity).

**A mistrial is proper where an improper statement goes to the heart of the central factual dispute and the evidence of guilt is not overwhelming.**

State v. Craft, 2017 UT App 87 (Roth). Craft and two other assailants broke into a house and beat and robbed a man. The man later identified Craft in a photo line-up. The prosecutor asked the detective who conducted the line-up how he chose the foils to use in the line-up. The detective misunderstood and said that Craft's codefendants said Craft was at the crime scene. The court reiterated that a mistrial is not appropriate where a statement is not intentionally elicited, is made in passing, and is relatively innocuous in light of all the evidence. The court held that even though the statement here was not intentionally elicited and was made in passing, it was not relatively innocuous because it went to the heart of Craft's defense—his presence at the crime scene—and the evidence of guilt was not overwhelming. Counsel was thus ineffective for not asking for a mistrial.

**A mistrial is not appropriate when a witness provides inadmissible testimony that is brief, unsolicited, undetailed, and not emphasized.**
State v. Yalowski, 2017 UT App 177 (Mortensen). During trial, a witness spontaneously stated that she broke up with Yalowski because he was "[g]etting violent." The prosecutor quickly redirected the witness's testimony. No more detail was given, and the prosecutor never relied on the statement. The court of appeals upheld the denial of a motion for mistrial.

**The burden to prove incompetency or competency is on the proponent of a change.**
State v. Parry, 2018 UT App 20 (Pohlman). Parry was charged with rape and other crimes. Parry's counsel filed a competency petition, and he was initially adjudicated incompetent. In all, four doctors opined on his competency—two said not competent but restorable; one said not competent and not restorable; one said competent and malingering. On the State's motion, the trial court re-opened the issue after getting the competent/malingering evaluation, and ruled Parry competent. The burden is as follows: if there's no finding yet, the burden is on the proponent of incompetency; if there is a finding of incompetency, the burden is on the proponent of competency.

**When the jury hears the strongest evidence in support of the defendant's theory, the erroneous exclusion of additional, incrementally supportive evidence is harmless, and a new trial is not warranted.**
State v. Montoya, 2017 UT App 110 (Roth). Montoya murdered his ex-wife's boyfriend. Montoya and the boyfriend had fought before, and the boyfriend had threatened to kill Montoya. The dispute at trial centered on who brought the gun to the confrontation that ended in the boyfriend's death. Montoya moved for a new trial, arguing that the court wrongfully excluded other evidence of the boyfriend's prior violent behavior involving a gun. Denial of a new trial was appropriate because the evidence would not have made a difference—the jury already heard the strongest evidence about the boyfriend's violent character and his motive for bringing a gun to meet Montoya.

**A generalized fear of retaliation does not require the trial court to quash a subpoena, though particularized fear may require the State to provide a witness with some protection to make compliance with the subpoena reasonable.**
State v. Morris, 2017 UT App 112 (Orme). Fellow gang members asked Morris to retaliate against someone who had talked to police. Morris agreed and asked Logue to help. Logue killed the person. Morris accepted a plea deal, but when the State subpoenaed him to testify in Logue's trial, he unsuccessfully moved to quash the subpoena. He also refused to testify when he took the stand. Morris argued that the court had some duty to either quash the subpoena because his fear of retaliation outweighed the State's need for his testimony, or to take some unspecified measures to protect him against retaliation. The court of appeals did not fully address this issue because it was unpreserved, but it stated that a generalized fear of retaliation does not justify quashing a subpoena. However, the court indicated that in the appropriate case the State may be required to provide protection to a witness to make compliance with the subpoena reasonable under Utah R. Crim. P. 14.

**Utah law does not mandate a separate trial of a weapons charge.**
State v. Vu, 2017 UT App 179 (Orme). Vu was convicted of drug possession with intent to distribute and possession of a firearm by a restricted person based on a prior felony. He argued plain error and ineffective assistance after trial counsel stipulated that he was a restricted person. No case has ever required bifurcation of a defendant's restricted status. Plus, Vu was not prejudiced because there are several reasons a person may be a restricted person, and the jury never heard that Vu was a felon.

**Under rule 30(b), whether something is a clerical error turns on the intent of the court, not the parties. Under rule 60(b), a two-year delay after the defendant learns of the basis of his complaint, with no explanation for the delay, makes the motion untimely.**
State v. Wynn, 2017 UT App 211 (Mortensen). After Wynn pleaded guilty to securities fraud and related counts, the trial court ordered Wynn to pay over $700,000 in restitution to all victims—including victims of charges that were dismissed as part of a plea agreement. Wynn did not challenge the amount of restitution and agreed that it sounded right. Several years later, he argued that it was a scrivener's error under rule 30(b). But he did not challenge the calculation, only the inclusion of victims from dismissed charges. That was the product of judicial reasoning, and the trial court had expressly stated its intent on this point. Wynn also filed a rule 60(b) motion. But that motion came at least two years after Wynn knew of any potential problems with the restitution order, and he offered no justification for the delay. And because the 60(b) motion was untimely, the court did not have jurisdiction to order discovery related to that motion.

**A bill of particulars does not force the prosecution to elect which theory of an offense it is proceeding under.**
Zaragoza v. State, 2017 UT App 215 (Harris). Zaragoza beat his wife with a baseball bat for two hours in a motel room. He was charged with aggravated kidnapping, aggravated assault, and domestic violence in the presence of a child. He didn't deny assaulting his wife, but he argued that he didn't do it for two hours. After losing at trial and on appeal, Zaragoza filed a post-conviction petition arguing that trial counsel was ineffective for not asking for a bill of particulars to force the prosecution to specify whether it was relying on a theory of kidnapping or unlawful detention. But a bill of particulars would not have forced the prosecution to elect a particular theory.

**A showing of bad faith is required to exclude expert testimony in the face of a statutory notice violation.**
State v. Roberts, 2018 UT App 9 (Pohlman). Roberts raped, sodomized, and sexually abused a child. The child's therapist testified. After about 30 minutes of testimony, including fact testimony interspersed with expert testimony, trial counsel objected because the State had not given notice that the therapist would testify as an expert. Trial counsel strategically chose to ask the court to strike the testimony rather than for a continuance. The court of appeals upheld the denial of the motion to strike because the statute guarantees only a continuance for a lack of notice, but the court has no discretion to exclude the testimony absent a showing of a

deliberate violation of the notice statute.

**To obtain a new trial based on inaccuracies in a court-appointed translator's translation, the defendant must, at a minimum, show that he was prejudiced by any inaccuracies.**
**State v. Aziz, 2018 UT App 14 (Toomey).** As Aziz was being removed from a bar by a bouncer, Aziz bit the bouncer's cheek, removing a quarter-sized piece of flesh. At the preliminary hearing, Aziz's friend testified without a translator, but at trial, he used a court-appointed Arabic translator. Aziz moved for a new trial, arguing that there were inaccuracies in the translation. The court of appeals identified a possible test for determining when a new trial is warranted based on alleged inaccuracies in a translation, but the court did not adopt it because Aziz had not shown prejudice: the friend never saw the bite, and even if there were inaccuracies in the translation, his trial testimony as presented through the translator was consistent with the friend's preliminary hearing testimony.

## DEATH PENALTY

**The "miscarriage of justice" exception for reaching defaulted federal habeas claims on the basis of factual innocence does not apply to jury instruction errors.**
**Jenkins v. Hutton, 16-1116 (per curiam).** Through a per curiam opinion, the Court summarily reversed a Sixth Circuit decision that had granted habeas relief to a capital inmate based on a claim he had defaulted. The Sixth Circuit excused the default based on the "miscarriage of justice" exception, i.e., on the ground that the inmate was actually innocent of the death penalty. Reversing, the Court held that the Sixth Circuit made two errors. First, it incorrectly stated that the jury had not found the existence of any aggravating factors. It had. Second, the Sixth Circuit wrongly applied an approach that "would justify excusing default whenever an instructional error could have been relevant to a jury's decision," which "is incompatible with Sawyer [v. Whitley, 505 U.S. 333 (1992)]."

**Inability to remember committing a crime is different than being able to form the necessary mental state to commit the crime.**
**Dunn v. Madison, 17-193 (per curiam).** Through a unanimous *per curiam* opinion, the Court summarily reversed an Eleventh Circuit decision that had granted habeas relief to a defendant on the ground that he was incompetent to be executed because he could not recall his commission of the murder. The Court explained that in *Ford v. Wainwright*, 477 U.S. 399 (1986), and *Panetti v. Quarterman*, 551 U.S. 930 (2007), it established that "the Eighth Amendment forbids execution of a prisoner who lacks 'the mental capacity to understand that [he] is being executed as punishment for a crime.'" "Neither *Panetti* nor *Ford* 'clearly established' that a prisoner is incompetent to be executed because of a failure to remember his commission of the crime, as distinct from a failure to rationally comprehend the concepts of crime and punishment as applied to his case."

## DUE PROCESS – FIFTH AND FOURTEENTH AMENDMENTS

**The term "unlawful user of a controlled substance" in the unlawful firearm possession statute is not vague where the person challenging the statute admits present-tense drug use.**
State v. Garcia, 2017 UT 53 (Pearce). Garcia got mad at his cousin and did a drive-by shooting at his cousin's house. Garcia was charged with attempted murder and unlawful possession of a firearm based on his being an unlawful user of a controlled substance. When he was arrested, Garcia told police that he "doe[s] a lot of cocaine like, sometimes." Garcia argued that the term "unlawful user" was unconstitutionally vague. Because Garcia's conduct was clearly prohibited even under a narrow reading of the statute, his vagueness claim failed.

**The aggravated murder sentencing scheme does not violate due process, equal protection, or the uniform operation of laws clause.**
State v. Reyos, 2017 UT App 132 (Toomey). Reyos killed a sixteen-year-old boy, was convicted of aggravated murder, and was sentenced to life without parole. Reyos challenged the constitutionality of the aggravated murder sentencing scheme, arguing that the way the capital and non-capital sentencing statutes worked together made the whole scheme unconstitutional, particularly in treating capital defendants more favorably by giving them a jury. The court of appeals rejected Reyos's arguments, reaffirming that the aggravated murder sentencing scheme does not violate due process, equal protection, or the uniform operation of laws clause.

**Not every failure of government rises to the level of a procedural due process violation; notice need only reasonably apprise a person of the essential information needed to assert her rights.**
Bivens v. Salt Lake City Corp., 2017 UT 67 (Himonas). For three years after Salt Lake City replaced parking meters with pay stations, the city code was not updated to reflect that change. Several people filed a class action alleging due process violations for inadequate notice about the procedures to challenge parking tickets, and claiming unjust enrichment because the city code did not authorize issuing parking tickets for failure to pay at a pay station. While the court found the notice "troublingly misleading," the notice did not violate due process because it reasonably apprised people of the essential information needed to assert their rights. And because they did not exhaust those procedures, they could not bring an equitable action against the city.

**Exclusion of evidence under rule 403 does not violate the due process right to present a defense because the rule requires case-by-case proportionality.**
State v. Martin, 2017 UT 63 (Himonas). Martin groped his two young sisters-in-law. The court admitted some but excluded other evidence under rule 403 that Martin's mother-in-law had made several false allegations of sexual abuse in the past. Although some rules of evidence may, in particular cases, violate the due process right to present a defense because application of the rule is disproportionate to the purposes of the rule, rule 403 has a proportionality test "baked into it," so proper exclusion of evidence under rule 403 cannot violate due process.

## DOUBLE JEOPARDY

**Double jeopardy does not bar a subsequent prosecution after a trial court grants a mistrial with defendant's agreement. The prosecutor did not goad defense counsel into a mistrial by seeking in good faith to call defense counsel as a witness for the limited purpose of clarifying a point in evidence.**
State v. Reyes-Gutierrez, 2017 UT App 161 (Pohlman). R-G stole a pair of shoes from a store. There was video surveillance of the theft, but neither party was able to view it before trial. At trial, the defense implied through questioning that the State had lost the video. The State tried to correct this impression, and threatened to call defense counsel as a witness for the limited purpose of explaining that neither party could get the video to work. Defense counsel said that if called as a witness, she would move for a mistrial. The court said the prosecutor could call her, but then granted the mistrial. R-G was tried again and convicted, but argued that this was barred by double jeopardy because trial counsel was provoked into agreeing to a mistrial. The court of appeals disagreed, explaining that the prosecutor did not act in bad faith, but was merely trying to educate the jury about the video.

**Whether something is a lesser-included offense for purposes of obtaining a defense-requested jury instruction is irrelevant to whether it is a lesser-included offense for purposes of merger. Multiplicity involves multiple charges under the same statute covering the same act, or charging the same act under both a greater and necessarily-included lesser offense.**
State v. Calvert, 2017 UT App 212 (Pohlman). Calvert pointed a gun at and threatened a group of children and, later, the children's uncle. Calvert was convicted of aggravated assault and threatening with a dangerous weapon. Counsel was not ineffective in not raising a double jeopardy challenge because it would have been futile. Threatening with a dangerous weapon is not necessarily included in aggravated assault because it has a unique element—the presence of two or more people. Thus, threatening with a dangerous weapon does not merge with aggravated assault, even if it may be a lesser-included offense for purposes of submitting a defense-requested instruction to the jury. Furthermore, the case did not present any multiplicity problem: Calvert was charged for separate conduct under separate statutes, neither of which was necessarily a lesser-included offense of the other.

## EIGHTH AMENDMENT

**Graham v. Florida's prohibition on juvenile LWOP does not clearly apply to consecutive sentences for multiple crimes.**
Virginia v. LeBlanc, 16-1177 (per curiam). Through a per curiam opinion, the Court summarily reversed a Fourth Circuit decision that had granted habeas relief to a juvenile who claimed that his sentence for rape — under which he may petition for parole at the age of 60 — violated Graham v. Florida, 560 U.S. 48 (2010). Graham held "that the Eighth Amendment prohibits juvenile offenders convicted of nonhomicide offenses from being sentence to life without

parole." The Court held here that "it was not objectively unreasonable for the state court to conclude that, because the geriatric release program employed normal parole factors, it satisfied Graham's requirement that juveniles convicted of a nonhomicide crime have a meaningful opportunity to receive parole."

**The DUI metabolite statute does not require impairment.**
**State v. Outzen, 2017 UT 30 (Durrant).** Outzen smoked marijuana, then drove. He fell asleep at the wheel and caused a crash. He was charged under the DUI metabolite statute (Utah Code 41-6a-517). Outzen argued that because it did not require impairment, the statute was an unconstitutional status offense under the Eighth Amendment and also violated the Uniform Operation of Laws Clause of the State Constitution. The supreme court disagreed, holding that the statute was within the Legislature's authority, and that they could criminalize the act of driving with an illegal substance in one's body, even if that substance was not presently impairing the person. It was not a status offense, because assuming that the illegal substance was ingested voluntarily, a person could control whether it was in their body.

## EQUAL PROTECTION

**The aggravated murder sentencing scheme does not violate due process, equal protection, or the uniform operation of laws clause.**
**State v. Reyos, 2017 UT App 132 (Toomey).** Reyos killed a sixteen-year-old boy, was convicted of aggravated murder, and was sentenced to life without parole. Reyos challenged the constitutionality of the aggravated murder sentencing scheme, arguing that the way the capital and non-capital sentencing statutes worked together made the whole scheme unconstitutional, particularly in treating capital defendants more favorably by giving them a jury. The court of appeals rejected Reyos's arguments, reaffirming that the aggravated murder sentencing scheme does not violate due process, equal protection, or the uniform operation of laws clause.

## EVIDENCE

**The foundational requirements for the doctrine of chances do not provide a checklist for analysis under rule 403 any more than the *Shickles* factors should. Courts may consider them, but need not apply them in every case.**
**State v. Lowther, 2017 UT 34 (Durrant).** Lowther was charged with rape, and the trial court admitted 404(b) testimony of three other victims. In admitting the evidence, the trial court relied solely on the *Shickles* factors. The court of appeals reversed, holding that the doctrine of chances under *State v. Verde* displaced the *Shickles* factors. This was error—trial courts should rely on any relevant consideration going to the question under rule 403: whether the evidence's probative value is substantially outweighed by the danger for unfair prejudice. Remanded for consideration under proper factors.

**An officer can testify about the "21-foot rule" (kill zone for knife attacks) to show his state of mind during an attack.**

**State v. Fairbourn, 2017 UT App 158 (Mortensen).** An officer saw Fairbourn walking in the middle of the street and thought it strange. He followed Fairbourn, who became agitated, pulled out a knife with a seven-inch blade, and told the officer he was "about to fucking die." The officer shot him three times in self-defense. Fairbourn was charged with attempted aggravated murder. The prosecutor asked the officer what was going through his mind when Fairbourn threatened him; the officer said that he was concerned that Fairbourn was within 21 feet of him at the time of the threat, which in the officer's training constituted the "kill zone." Fairbourn argued that this was improper expert opinion and irrelevant. The expert opinion claim was unpreserved, so the court addressed only the relevance objection, holding that it was relevant to show the officer's state of mind.

**Evidence rebutting a defendant's testimony is probative of the defendant's credibility, but that probative value may be minimal if it rebuts only a tangential or collateral point. Still, the State has leeway to introduce some evidence with a high risk of prejudice when a defendant opens the door to it.**

**State v. Miranda, 2017 UT App 203 (Harris).** Miranda raped and sexually abused his stepdaughter. During Miranda's direct testimony, he testified that he and the victim's mother divorced because she cheated on him. On cross-examination, the State got him to admit—as alternative reasons for the divorce—that he had been violent with the mother and that she accused him of using cocaine, though he denied it. The State then put the mother on the stand as a rebuttal witness. She said they divorced because Miranda was abusive, he used cocaine, she found pornography on his computer, and he cheated on her "emotionally" with other women. That evidence was relevant to undermine Miranda's credibility, though the probative value was low because it went to a tangential issue. Although the risk of unfair prejudice was high, Miranda opened the door at least partially. But mother's rebuttal testimony went too far, though its admission was harmless.

**Counsel was not ineffective for stipulating to admission of 404(b) evidence that the defendant had raped the victim's sister where the defendant had admitted raping the victim and counsel tried to convince the jury that the victim and her sister were being manipulated by their mother as revenge against the defendant for his infidelity.**

**State v. Ringstad, 2017 UT App 199 (Christensen).** Ringstad lived with his wife and her two daughters. Ringstad abused both girls for many years, and was also unfaithful to his wife in other ways. Ringstad admitted abusing the victim when he spoke with police. At trial, when the State called the victim's sister to testify of Ringstad's abuse of her, defense counsel did not object. This was not deficient performance because counsel faced the difficult hurdle of injecting reasonable doubt into a case where his client confessed. Because the girls did not show outward signs of abuse, he argued that they were not actually abused, but their mother had manipulated them into fabricating the abuse in revenge for his infidelity and an attempt to get a favorable divorce settlement.

**Threats are commonly not hearsay, because they do not make assertions capable of being proved true or false.**
State v. Scott, 2017 UT App 74 (Toomey). Scott shot and killed his wife, and he argued that he did it under extreme emotional distress. Scott and his wife had been arguing for several weeks. The day before Scott shot his wife, he saw her crouched by their open gun case and her gun was not there. Scott also said his wife had threatened him that day. The next day, Scott "snapped" and shot his wife when she started yelling at him. At trial, the court ruled that the content of the wife's earlier threat was hearsay. The court of appeals held that defense counsel was deficient for not arguing that the threat was non-hearsay—it was used to show its impact on Scott. Furthermore, a threat typically is not capable of being proved true or false.

**To be admissible under rule 702, an expert's opinion must be supported by a foundation demonstrating that the underlying principles/methods are applied in the right context.**
State v. Lopez, 2018 UT 5 (Pearce). Komasquin Lopez was convicted of shooting his wife. Part of the State's evidence at trial was testimony from a "suicideologist" who opined that the victim was at low risk to commit suicide. To arrive at this opinion, the expert used something called the fluid vulnerability theory of suicide (FVTS), which is a tool that psychologists use to treat people who are suicidal. The trial court ruled that the State laid sufficient foundation because FVTS was a generally-accepted method of determining suicide risk. The Supreme Court disagreed, holding that because the State's expert never testified that FVTS was generally-accepted to gauge suicide risk after-the-fact, the State did not lay sufficient foundation.

**To prove identity under rule 404(b) without an intermediate inference, the prior acts evidence has to be quite similar (modus operandi-like) to the evidence on the charged crime.**
State v. Lopez, 2018 UT 5 (Pearce). Komasquin Lopez was convicted of shooting his wife during an argument about meth use as they drove in a truck together. Part of the State's evidence at trial was testimony that Lopez had previously (1) pointed a gun at his ex-wife during an argument and (2) pointed a gun at the victim's head during a discussion of how to commit suicide. The trial court admitted the evidence to prove identity. The supreme court reversed, holding that the evidence was not similar enough, and that to prove identity with prior acts, the similarity has to be high. The exception is where the State seeks to use such evidence to prove identity through an intermediate inference—e.g., that D had access to the murder weapon or was in the area at the time of a crime.

**Using other-acts evidence to show lack of consent or lack of mistake about consent is a valid, non-character purpose.**
State v. Van Oostendorp, 2017 UT App 85 (Roth). Van Oostendorp was mad at his girlfriend, so he urinated on her then anally sodomized her. Despite her screaming, crying, and saying, "No, stop. It hurts," Van Oostendorp argued at trial that it was consensual or that he at least reasonably thought it was based on their history of consensual rough sex. Other-acts evidence of Van Oostendorp's demeaning treatment of and threats of violence toward his girlfriend was admissible under 404(b) because the State used it to show lack of consent and lack of mistake about consent. It was offered to show that any prior "consent" was the result of Van

Oostendorp's threats. Also, some of the other-acts evidence could support Van Oostendorp's theory that the couple had a "submissive/dominant type of sexual [relationship] that was completely consensual."

**Minor memory problems do not make a witness incompetent to testify.**
State v. Van Oostendorp, 2017 UT App 85 (Roth). Van Oostendorp was mad at his girlfriend, so he urinated on her then anally sodomized her. At trial the girlfriend had minor memory gaps, leading her to jumble the sequence of events or forget some details leading up to and following the anal sodomy. But minor memory problems do not render a witness incompetent to testify.

**Any error in admitting testimony is harmless when it is cumulative and extensive corroborative evidence supports the conviction.**
State v. Fahina, 2017 UT App 111 (Pohlman). Fahina was convicted of aggravated assault (DV) but acquitted of aggravated sexual assault, forcible sodomy, and aggravated kidnapping. When an officer arrived on the scene after the assault, the victim was on the curb, distraught and crying. At trial, the court admitted the officer's account of the victim's statements under the excited utterance exception to the hearsay rule. The court of appeals did not address whether this was error because any error was harmless. The victim had testified too, and there was physical evidence and witnesses who corroborated key aspects of the aggravated assault. Also, the jury's split verdict suggested that the jury was not swayed by the officer's account of the victim's statements, which would have supported all the charged offenses.

**Prior instances of aggressive treatment of a victim are relevant to proving pattern, identity, intent, and lack of accident or mistake; on the other hand, yelling, name-calling, and flipping-off have at most thin relevance when the crime involves the infliction of serious injury.**
State v. MacDonald, 2017 UT App 124 (Voros). MacDonald was charged with child abuse and obstruction of justice after the 10-month-old baby he was watching was taken to the hospital and diagnosed with several injuries that resulted in irreversible brain damage, blindness, and seizures. On interlocutory appeal, the court held that evidence of MacDonald's prior aggressive treatment of the baby was admissible under rule 404(b) for a noncharacter purpose. But prior instances of yelling at the baby were inadmissible. Likewise, calling the baby a whiner and flipping him off was inadmissible under rule 403 because even though it could show contempt for the baby, it did not show a level of contempt necessary to explain the kinds of injuries the baby sustained.

**Evidence of gang affiliation and general testimony about gangs is not other-acts evidence under rule 404(b). But even under 404(b), such evidence can be highly probative of a non-character purpose.**
State v. Trujillo, 2017 UT App 116 (Orme). When police arrested Trujillo for aggravated assault arising out of a confrontation with some neighbors, Trujillo said someone would have to "pay," and that "my boys will be paying [the neighbors] a visit . . . and it's [the officers'] fault." Trujillo added, "Do you expect me to go to . . . jail and nothing happen?" Trujillo was charged with retaliation against a witness, victim, or informant. The jury heard testimony that Trujillo was a

gang leader and had a gang tattoo. An expert testified generally about retaliation in gang culture. The gang evidence was admissible because it was not "bad acts" evidence under rule 404(b) and even if it were, it was offered to prove that the statements constituted a threat, and it was highly probative and not unfairly prejudicial on that point.

**When a defendant is found in possession of a distributable amount of drugs, evidence of prior drug sales is admissible under rules 404(b) and 403 to prove intent to distribute.**
State v. Vu, 2017 UT App 179 (Orme). Officers set up five controlled buys from Vu using a confidential informant. Officers then arrested Vu in an apartment where three of the buys took place; they found him using meth, with a distributable amount of meth in the same room. The evidence of the prior controlled buys was admissible to prove his intent to distribute the drugs.

**Court did not abuse discretion by allowing inquiry into some prior dishonest acts under rule 608(b) but disallowing inquiry into other less probative acts.**
State v. Yalowski, 2017 UT App 177 (Mortensen). Yalowski broke into his ex-girlfriend's house, urinated on her wall, and threatened to shoot up the place with some friends waiting outside. At trial, the court allowed Yalowski to ask his ex-girlfriend about using a false identification to visit him in jail, but the court did not let him ask about a prior arrest and a prior plea in abeyance, both for theft by deception. The court did not abuse its discretion because it could reasonably conclude that the uncharged offense and dismissed plea in abeyance were less probative. Also, any error was harmless because the ex-girlfriend's testimony was not crucial and Yalowski was able to present the other impeachment evidence under 608(b).

**Under rule 701, a lay witness can testify about shoeprints based on personal observation even if the question might be capable of scientific determination.**
State v. Yalowski, 2017 UT App 177 (Mortensen). Yalowski broke into his ex-girlfriend's house, urinated on her wall, and threatened to shoot up the place with some friends waiting outside. At trial, a forensic technician testified about shoeprints found in the snow and on a broken door, offering his opinion that the tracks were "identical" to Yalowski's shoes. Yalowski argued that this was expert testimony that the witness could not provide. But the witness was simply offering his opinion based on personal observation, not scientific analysis.

**Evidence is not cumulative when it is different in kind from other evidence proving the same point. And the ability to carry on a coherent text conversation just two hours before a drunken rampage is probative of a defendant's ability to have a knowing mental state.**
State v. Thompson, 2017 UT App 183 (Toomey). Thompson's wife woke him from a drunken slumber and confronted him about his drinking and about several sexually explicit text messages he sent to another woman just two hours earlier. Thompson became enraged, and when the fight moved outside, Thompson beat or threatened anyone who tried to intervene. Thompson then got in his full-sized pickup truck and sped off. As he came to a busy intersection with a red light, Thompson pushed the gas pedal to the floor and drove into the intersection at over 60 mph, hitting several cars, injuring several people, and killing one woman. The text messages were admissible at trial because they were relevant to rebutting Thompson's

voluntary intoxication defense by showing that he was capable of forming a knowing mental state. The text messages were not cumulative because other evidence of his mental state was different in kind.

**The reliability of a CJC interview is a question of law but it involves a fact-intensive inquiry and the trial court has discretion to weigh various factors in determining reliability.**
State v. Roberts, 2018 UT App 9 (Pohlman). Roberts raped, sodomized, and sexually abused a child. The trial court found the CJC interview reliable and admitted a recording of it. Expert testimony criticizing the interviewer's techniques did not establish unreliability because the court credited the State's competing expert, and because there is no one right way to conduct an interview. The year between the abuse and the interview did not undermine the reliability of the interview because the interview was significantly closer in time to the abuse than the trial testimony was. And when viewed from a six-year-old's perspective, there was nothing incredible or fanciful about the victim's allegations.

**Evidence of a third party's prior convictions for child sexual abuse is properly excluded under rule 403 when the third party has no apparent connection to the abuse at issue.**
State v. Roberts, 2018 UT App 9 (Pohlman). Roberts raped, sodomized, and sexually abused a child. Roberts offered evidence that the victim's grandfather had prior convictions for child sexual abuse, but the court excluded it based on rule 403. Roberts argued that it was relevant to show the identity of the abuser and provide an alternate source of sexual knowledge. But the probative value was minimal and the risk of confusing the issues or misleading the jury was substantial because there was no evidence that the grandfather was ever near the scene of the abuse or had any other connection to the abuse.

**Preliminary hearing testimony is generally not admissible at trial under rule 804(b)(1) because the probable-cause determination does not give a motive for full cross-examination about credibility.**
State v. Goins, 2017 UT 61 (Pearce). Goins assaulted two homeless people because he thought one of them stole his phone. Both testified at a preliminary hearing. When one of them failed to appear at trial, the prosecutor played a recording of the preliminary hearing testimony. The supreme court reversed a conviction that was based solely on that testimony because the Utah Constitution limits preliminary hearings to a probable cause determination. And probable cause does not allow the magistrate to inquire into credibility—unless the testimony is so contradictory, inconsistent, or unbelievable that no jury could find it credible. In all but the rarest cases, preliminary hearing testimony is not admissible under the hearsay exception in rule 804(b)(1) because defendants will not have the same motive to cross-examine the witness as at trial.

**Trial courts must carefully assess all scientific and technical evidence and argument presented in deciding whether to admit profile testimony. Experts cannot testify directly about the credibility of a victim.**
State v. Martin, 2017 UT 63 (Himonas). Martin groped his two young sisters-in-law. An expert

testified about the typical behaviors of a victim of child sexual abuse but said the behaviors are not reliable indicators of abuse. The expert also said once that the victim "seemed credible," but otherwise did not connect her general testimony to the victims in this case. The supreme court held that the credibility statement was improper, but it affirmed because Martin only asked the trial court to strike it and give a limiting instruction, which it did. The supreme court did not rule on the admissibility of the profile testimony because Martin did not challenge it below, but the court expressed concern about such testimony.

**It was not an abuse of discretion to exclude evidence of unrelated false allegations when the falsity of those allegations was disputed, the State would have put on extensive rebuttal evidence leading to several trials-within-trials, and the probative value was minimal.**
**State v. Martin, 2017 UT 63 (Himonas).** Martin groped his two young sisters-in-law. The court admitted some but excluded other evidence under rule 403 that Martin's mother-in-law had made several false allegations of sexual abuse in the past. The falsity of the allegations was disputed, the State was prepared to put on extensive rebuttal evidence, the connection to the present offense was minimal or non-existent, and it had minimal probative value. The trial court thus had discretion to exclude it.

**Unavailability under rule 804(a)(4) requires a showing that the illness is of such severity and duration that a reasonable continuance will not allow the witness to testify.**
**State v. Ellis, 2018 UT 2 (Lee).** An eyewitness testified at a preliminary hearing, but a week before trial she gave birth to a baby that was several weeks premature. She refused to leave her baby to testify at trial. The court found her unavailable and admitted the preliminary hearing testimony. The supreme court reversed, holding that the proponent of the evidence must make a showing as to the severity and duration of the illness that would support a conclusion that she would be unable to testify over a period of time within which the trial reasonably could be held.

## EYEWITNESS IDENTIFICATION

**Eyewitness identification was admissible, despite flaws, when witness saw unmasked assailant for five to ten minutes and was shown a photo lineup that largely followed proper procedures.**
**State v. Craft, 2017 UT App 87 (Roth).** Craft and two other assailants broke into a house at night, woke a man by hitting him in the head with a gun, and searched his room. They forced him into another room then made him and his mother, whom they had dragged out of her bed, kneel on the ground and keep their heads down as the assailants rummaged around. The assailants were masked, but at some point Craft took his mask off. In ambient light from a nearby closet, the man was able to see Craft's face for five to ten minutes in his peripheral vision. Several hours later, police showed the man a photo line-up, one photo at a time, with Craft and five other similar-looking people. The man identified Craft. The court held that despite some problems with the viewing conditions and photo line-up, the identification was

admissible under the controlling *Ramirez* test.

**An in-court identification is not required where circumstantial evidence establishes the defendant's identity as the perpetrator.**
**State v. Cowlishaw, 2017 UT App 181 (Toomey).** Cowlishaw stole a car, talked an acquaintance into going for a ride with him, then refused to take her home. After driving around for 6 hours, Cowlishaw fled from police, crashed the car, then escaped on foot, leaving his captive behind. At trial, the acquaintance never specifically identified Cowlishaw, and the car owner never explicitly said, "That's my car." But everything about the acquaintance's and car owner's testimony tied Cowlishaw to the crimes. Plus, his fingerprints were on the car.

## FIFTH AMENDMENT—SELF INCRIMINATION

**A person involuntarily committed to a mental institution is not in custody for *Miranda* purposes.**
**State v. Reigelsperger, 2017 UT App 101 (Pohlman).** Reigelsperger kidnapped and raped his estranged wife, all the while threatening to kill himself. When wife was able to leave, she called police and told them of the crimes as well as his intent to commit suicide. Police took him to the mental hospital and had him committed as a risk to himself. They later went to the hospital with a warrant to get his DNA and to arrest him. When they spoke with him, they didn't tell him about the warrants, and asked for a DNA sample. Reigelsperger agreed, and then started to talk about his crimes. Police stopped him and gave an incomplete *Miranda* warning. They then got a full *Miranda* waiver and recorded the interview. Reigelsperger argued that his pre-*Miranda* statements were inadmissible. The court of appeals disagreed, holding based on the *Carner* factors that he was not in custody at the time he was interviewed—there was no show of force, no restraint akin to arrest, and the interview was brief, lasting less than 30 minutes. And his commitment was a result of his intent to self-harm, not restraint related to his crimes.

**For a defendant to be in custody for purposes of *Miranda*, the totality of the circumstances must show that a reasonable person would not feel free to leave and that the environment presents same kind of inherently coercive pressures at issue in *Miranda*.**
**State v. MacDonald, 2017 UT App 124 (Voros).** MacDonald was charged with child abuse and obstruction of justice after the 10-month-old baby he was watching was taken to the hospital and diagnosed with several injuries that resulted in irreversible brain damage, blindness, and seizures. On interlocutory appeal, the court held that statements from two police interviews were admissible because MacDonald was not in custody. Despite the nominally accusatory nature of the first interview and MacDonald's likely awareness that he was a suspect, the interview bore no other indicia of arrest or features of domination or coercion akin to that involved in *Miranda*. Although the second interview was more accusatory and a reasonable person would not have felt free to leave that interview, the totality of the circumstances did not make this akin to an arrest and the environment likewise lacked any features of domination or coercion.

**Use immunity forecloses use of testimony or its fruits against the witness in subsequent state and federal prosecutions.**
State v. Morris, 2017 UT App 112 (Orme). Fellow gang members asked Morris to retaliate against someone who had talked to police. Morris agreed and asked Logue to help. Logue killed the person. Morris accepted a plea deal, but when the State subpoenaed him to testify in Logue's trial, he unsuccessfully moved to quash the subpoena. He also refused to testify when he took the stand. In response to the subpoena, the State granted Morris use immunity. That foreclosed federal prosecution arising out of his testimony and effectively "nullified his privilege."

**The State has the burden of proving the validity of a minor's waiver of his *Miranda* rights based on a totality of the circumstances, measured by the following factors: age, intelligence, education, experience, ability to comprehend, use of coercive tactics, and presence of a supportive adult.**
State v. R.G. and D.G., 2017 UT 79 (Durham). R.G. and D.G. sexually assaulted a classmate. They each confessed after waiving their *Miranda* rights. The supreme court upheld the validity of the waiver based on the totality of the circumstances, measured by the following factors: age, intelligence, education, experience, ability to comprehend, use of coercive tactics, and presence of a supportive adult. The State has the burned to prove a valid waiver, though the minor may produce evidence to undermine that conclusion or to rebut the rule-based presumption that a minor of at least 14 years of age is capable of waiving *Miranda* rights without an adult present.

## FIRST AMENDMENT

**A prisoner's rudimentary nude self-portrait that he attempted to send to his minor daughter was protected under the First Amendment because they were not detailed enough to be obscene, even as to minors.**
Butt v. State, 2017 UT 33 (Lee). Eric Leon Butt wrote letters to his wife and children which included a rudimentary drawing of himself naked, biting his dauther's butt and saying, "Oh, your butt tastes so good." He was prosecuted for dealing in materials harmful to a minor, and that conviction was affirmed on appeal under the deferential standard applicable to jury verdicts. In postconviction, he filed a petition arguing that counsel was ineffective for not arguing for a more favorable appellate standard of review under which the court would view the drawings for itself and decide if they were obscene as to minors. The State conceded that counsel was ineffective as to one of the pictures. On the other picture, the Supreme Court held that it was too rudimentary to be obscene as to minors. Thus, counsel was ineffective for not challenging it on that basis.

## FEDERAL HABEAS REVIEW

**The test for granting investigative and expert services to federal habeas petitioners in capital cases is whether the services are reasonably necessary, not whether there is substantial need.**
**Ayestas v. Davis, 16-6795 (Alito).** Title 18 U.S.C. §3599(f) authorizes federal courts to grant defendants and habeas petitioners in capital cases investigative and expert services that are "reasonably necessary." The Court unanimously held that the Fifth Circuit applied the provision in an unduly restrictive manner when it required petitioner, a Texas capital inmate, to show a "substantial need" to obtain the services. The Court held that the phrase "reasonably necessary" asks "whether a reasonable attorney would regard the services as sufficiently important," taking into account "the potential merits of the claims that the applicant wants to pursue, the likelihood that the services will generate useful and admissible evidence, and the prospect that the applicant will be able to clear any procedural hurdles standing in the way." The Court concluded that the Fifth Circuit's use of the term "substantial" arguably suggests a heavier burden. The Court also rejected Texas' contention that the district court's denial of funding was an administrative decision not subject to the Court's review. Rather, held the Court, it was a judicial decision because it was indisputably part of a judicial proceeding and required application of a legal standard.

## FOURTH AMENDMENT

**Probable cause turns on the totality of the circumstances viewed as a whole, not in isolation. Innocent explanations may be rejected based on the circumstances and common-sense inferences about human behavior.**
**District of Columbia v. Wesby, 15-1485 (Thomas).** Police officers found late-night partiers inside a vacant home belonging to someone else. After giving conflicting and implausible stories for their presence, some partiers claimed they had been invited by a different person who was not there. The lawful owner told the officers, however, that he had not authorized entry by anyone. The officers arrested the partiers for trespassing. Some partiers filed a § 1983 action alleging that they were arrested without probable cause. Despite innocent explanations provided by the partiers, probable cause existed based on the totality of the circumstances, viewed as a whole, to conclude that there was a substantial chance the partiers knew they did not have permission to be there.

**Officer safety justifies a negligible extension of a traffic stop to request identification and run background checks on car occupants.**
**State v. Martinez, 2017 UT 43 (Pearce).** Martinez was a passenger in a car pulled over for a traffic violation. During the stop, the officer asked for Martinez's identification and ran a warrants check. Finding a warrant, the officer arrested Martinez and found drugs and paraphernalia. The trial court ruled that the ID request and warrants check were outside the scope of the stop and suppressed the evidence. The Utah Supreme Court reversed, holding that the warrants check was a negligible extension of the stop that was justified by officer safety

concerns.

**A magistrate has a substantial basis to find probable cause for a warrant based on corroborated information from a confidential informant, even if police did not follow best practices.**
State v. Rowan & George, 2017 UT 88 (Durrant). Police sent a CI into Rowan & George's house to buy drugs. They searched the CI beforehand, gave him a specific amount of money to buy a specific amount of drugs, and followed the CI to the buy. After the buy, the CI met with police and gave them the drugs he had just bought. Rowan & George argued, and the trial court agreed, that because the officers never searched the CI's car, there was no probable cause for a search warrant. Though the officers did not search the CI's car before and after the buy, this did not undermine probable cause for the warrant.

**Police do not unlawfully extend a stop where an officer asks for consent to search while other officers are fulfilling the primary purpose of the stop.**
State v. Taylor, 2017 UT App 89 (Roth). Taylor was pulled over for following too close. While one officer did a records check and dealt with the citation, another officer asked Taylor for consent to search. Taylor gave consent, and police found drugs and paraphernalia. Taylor moved to suppress arguing that the purpose of the stop was fabricated and police extended the stop by asking for his consent. The court of appeals disagreed, noting that the trial court believed the officer on the traffic violation, and that the purpose of the stop was not complete when the other officer requested consent to search.

**An experienced officer seeing the occupants of three vehicles meet in a Wal-Mart parking lot, and a passenger from two of the vehicles get into the other car for a short time, had reasonable suspicion to stop the cars.**
State v. Sanchez-Granado, 2017 UT App 98 (per curiam). An officer saw a Lexus with two occupants pull into a Wal-Mart parking lot. The two people did not get out or go into the store, but used their cell phones and watched the lot. After about 20 minutes, a Chevy Tahoe and motorcycle pulled up, and passengers from each of those vehicles got into the Lexus for a few minutes. Officers stopped the three vehicles and found (surprise!) drugs. Sanchez-Granado was in the Lexus and filed a motion to suppress saying that the police did not eliminate innocent explanations for what was going on. The trial court and court of appeals disagreed, noting that reasonable suspicion does not require eliminating innocent explanations.

**Police do not unlawfully extend the scope of a stop when they use a drug-sniffing dog while waiting for a device to resolve a potential equipment violation.**
State v. Navarro, 2017 UT App 102 (Roth). An officer saw Navarro driving a car with window tint that appeared too dark. He also saw what appeared to be a rifle case in the back of the car. Believing based on his past experience that Navarro was a felon in possession of a gun, the officer had other officers stop the car. While waiting for a tint-measuring device, officers investigated Navarro's criminal history and ran a drug-sniffing dog around the car. The dog indicated, they searched, and found drugs. The tint-measuring device also showed an illegal tint. Navarro conceded that the initial stop was unlawful, but that police exceeded the scope by

searching for drugs rather than focusing on the equipment violation. Because the dog sniff happened while waiting for the tint device, police did not unlawfully extend the stop, and the dog sniff gave probable cause to search. The time was also reasonable to deal with the potential weapons violation and another car that was traveling with Navarro's car.

**Under the emergency aid doctrine, officers need only have an objectively reasonable—not ironclad—basis for believing that a person within a house needs immediate aid.**
**State v. Adams, 2017 UT App 205 (Orme).** When Adams's mother had, uncharacteristically, not heard from her adult son for several days, she asked police to check on him. He was in poor health and lived alone. The responding officer saw a ladder leaning against the house and several tools laying around, suggesting Adams was in the middle of several repair projects on his house. But neighbors had not seen Adams for two or three days. When Adams did not answer, the officer went in through an open window. He did not find Adams, but he found several marijuana plants. The court held that the search was reasonable under the emergency aid doctrine. The court also overturned the subjective component of the emergency-aid test in *Salt Lake City v. Davidson*, 2000 UT App 12, and it suggested that *Davidson*'s requirement of a life-threatening situation may be inconsistent with U.S. Supreme Court precedent.

**In seeking a warrant, an affiant may rely on the observations of fellow officers, without any special showing of the reliability of the fellow officers.**
**State v. Simmons, 2017 UT App 224 (Hagen).** Simmons was arrested for suspected drunk driving, and officers obtained a warrant for a blood draw. The officer who signed the affidavit was not the arresting officer, but throughout the affidavit he stated that the arresting officer witnessed the relevant facts. The affiant's reliance on the observations of the arresting officer did not violate the Fourth Amendment. Plus, there was nothing misleading about the affiant's statements.

**When officers have reasonable suspicion of multiple criminal offenses, they may, after completing an investigation into one offense, continue to detain a person for a reasonable amount of time to investigate the other offenses.**
**State v. Binks, 2018 UT 11 (Lee).** Officers had a warrant to search a suspected drug house. As they were preparing to execute the warrant, they saw Binks drive up to the house, enter for 2-3 minutes, then leave. As Binks drove away, he committed two traffic violations. Officers pulled him over and noticed that his eyes were glossy and bloodshot. But Binks passed field sobriety tests, and officers completed their records checks by 8:17. An officer executing the warrant on the house called at 8:22 to confirm that Binks had bought drugs there. Officers then searched him, found the drugs, and arrested him. The officers did not exceed the duration of a permissible *Terry* stop because their investigation of all suspected crimes had not concluded.

**Violation of a state statute does not amount to violation of the Fourth Amendment or entitle defendant to the exclusionary rule**
**State v. Jervis, 2017 UT App 207 (Pohlman).** Jervis was sitting in a car parked on the edge of a motel parking lot, as far away from any available rooms as possible. The motel was just off the

freeway. The car had no front license plate. It is a Class C Misdemeanor to drive a car on a highway without either of the license plates attached. There was enough here to support reasonable suspicion that Jervis had driven or was about to drive the car on a highway without the front license plate. Although the statute prohibits officers from stopping someone for driving without a front license plate, that was irrelevant to the Fourth Amendment analysis.

**Witnessing a hand-to-hand transaction, under circumstances suggestive of drug activity, may give rise to probable cause. The indeterminate nature of what an officer sees does not necessarily undermine probable cause.**

**State v. McLeod, 2018 UT App 52 (Hagen).** McLeod walked up to someone in a high-crime area, handed him some green paper that looked like money, took a small black thing that looked like a heroin twist—which the person had taken out of his mouth—pocketed it, and walked away. An officer watched this transaction from 70 yards away using binoculars. Relying on his experience and training, he recognized it as a drug transaction and stopped McLeod, ultimately arresting him because he recognized McLeod and thought (mistakenly) that he had a warrant out. But the arrest was objectively reasonable because of the nature of the transaction, judged by the officer's training and experience.

**Presence in a high-crime area is not enough to support reasonable suspicion when the district court implicitly finds that the defendant did not act nervously or furtively but instead acted consistently with someone who is innocent.**

**State v. McLeod, 2018 UT App 51 (Hagen).** An officer saw McLeod's car parked in the median in a high-crime area. He saw McLeod get out, go over to a group of three people who pointed out the officer, and then walk around the corner and out of sight. When McLeod returned to his car, he pulled out of the median without signaling, so the officer pulled him over. While the officer ran a records check, McLeod rummaged around his car. After completing the investigation of the traffic violation, the officer continued to question McLeod and asked if he could search his car. McLeod agreed, and the officer found drugs. The scope of the stop exceeded the time reasonably necessary to investigate the initial offense. And the officer did not have reasonable suspicion of drug activity because the district court refused to characterize McLeod's actions as suspicious. Being in a high-crime area was not enough.

**If the defendant is specifically named in a search warrant that also authorizes searches of a home and all persons present, then the search of defendant need not be tied to the execution of the home search.**

**State v. Matheson, 2018 UT App 63 (Orme).** Matheson and her boyfriend ran a drug house in St. George. Police got a warrant to search based on CI tips, observations of short-term traffic, trash covers, and finding drugs on one of the short-term visitors after they left the house. Matheson left the house before cops executed the warrant, and they stopped her four blocks away and searched her, finding drugs and paraphernalia. They then got a second warrant to search her truck. She argued on appeal that there was no probable cause for the warrant because the CI tips were not corroborated, but police did plenty of other things (like observe short-term traffic and trash covers) to support probable cause. She also argued that the

warrant limited them to searching her at the home, but because she was specifically named, she didn't have to be at the home and didn't fall under the "all persons present" provision.

## GUILTY PLEAS

**When a criminal defendant is affirmatively misadvised about the deportation consequences of his guilty plea, he can prove prejudice under Hill v. Lockhart even if the evidence of guilt is overwhelming.**

**Lee v. United States, 16-327 (Roberts).** By a 6-2 vote, the Court held that a noncitizen defendant who was misadvised that pleading guilty to a particular crime would not result in deportation (when in fact it results in mandatory deportation) can show prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984), and *Hill v. Lockhart*, 474 U.S. 52 (1985), even when the evidence of guilt was overwhelming. Under *Hill*, a defendant must show "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." The Court rejected the Sixth Circuit's holding here that because the evidence of guilt was overwhelming, petitioner could not show it would have been rational to go to trial to avoid removal. The Court stated that "common sense (not to mention our precedent) recognizes that there is more to consider than simply the likelihood of success at trial." And the Court found that petitioner showed prejudice here, given that "'deportation was the determinative issue in [his] decision whether to accept the plea deal,'" he had strong connections to the United States and none to the country where he would be deported to (South Korea), and the "consequences of taking a chance at trial" were merely "a year or two more of prison time."

**Santobello v. New York and Mabry v. Johnson leave it to state trial courts to fashion remedies for prosecutorial plea breaches; specific performance is permitted, but not required under federal law.**

**Kernan v. Cuero, 16-1468 (per curiam).** Through a unanimous *per curiam* opinion, the Court summarily reversed a Ninth Circuit decision that had granted habeas relief to a defendant on the ground that he was entitled to specific performance of a plea agreement that was superseded and withdrawn, in accordance with state law, before the entry of judgment. The Court held that even "assum[ing] purely for argument's sake that the State violated the Constitution when it moved to amend the complaint" and thereby the plea agreement, it was "unable to find in Supreme Court precedent that 'clearly established federal law' demanding specific performance as a remedy." Indeed, *Mabry v. Johnson*, 467 U.S. 504 (1984), stated that *Santobello v. New York*, 404 U.S. 257 (1971) — upon which the Ninth Circuit relied — "expressly declined to hold that the Constitution compels specific performance of a broken prosecutorial promise as the remedy for such a plea."

**The time limits in the plea withdrawal statute are jurisdictional.**

**State v. Allgier, 2017 UT 84 (Durrant).** Allgier pleaded guilty to aggravated murder and several other serious offenses. He moved to withdraw the plea only after sentencing. The plea

withdrawal statute limits appellate jurisdiction to cases where defendants move to withdraw the plea before sentencing. Allgier challenged the court's precedent interpreting that limitation as jurisdictional. The court rejected the argument and reaffirmed its precedent.

**The plea-withdrawal statute does not violate the state constitutional right to an appeal because it simply narrows the issues that may be raised on appeal using a rule of preservation and waiver. The requirement that untimely challenges to pleas be raised in post-conviction is not a procedural rule and thus does not violate the constitutional limits on legislative procedural rules.**

**State v. Rettig, 2017 UT 83 (Lee).** Rettig pleaded guilty to aggravated murder and aggravated kidnapping. He sent a pro se letter to the court asking to withdraw the plea and complaining about counsel. He got new counsel, and that counsel withdrew the request to withdraw the plea. Rettig appealed, arguing that his plea was unknowing and involuntary and that he received ineffective assistance of counsel in deciding to plea and deciding to withdraw the request to withdraw his plea. Because the plea withdrawal statute limits appellate jurisdiction to cases where defendants move to withdraw the plea before sentencing, Rettig argued that the statute deprived him of a right to appeal. The court rejected the argument because the plea withdrawal statute simply limits the issues that may be raised on appeal. It sets a preservation rule, not subject to any exceptions, and imposes a consequence—waiver of the right to challenge the plea. Rettig also argued that the plea withdrawal statute's requirement that untimely challenges to the plea must be pursued in post-conviction violated the constitutional restriction on the legislature's authority to impose procedural rules. The court held that this aspect of the statute was not procedural.

## JURY INSTRUCTIONS

**Counsel performs deficiently in a forcible sexual abuse case by not insisting that the court either define or remove "indecent liberties" from a jury instruction.**

**State v. Ray, 2017 UT App 78 (Orme).** Ray was charged with various sex offenses involving a fifteen-year-old girl whom he romanced with, among other things, rose petals, a vibrator, and watching Twilight: New Moon while naked together. The jury instructions on forcible sexual abuse included, but did not define, an "indecent liberties" theory. Defense counsel did not object to the instruction, and neither party argued indecent liberties, relying solely on a touching theory. On appeal, Ray argued that the jury might have been confused by the "indecent liberties" language, and that counsel was ineffective for not seeking to define it or excluding it all together. The court of appeals agreed that counsel was objectively deficient for not doing so, and that this failure prejudiced Ray because there is no telling whether the jury relied on an improper theory or not, and the jury actually acquitted of other counts.

**Jury instructions correctly state the law when they include caselaw glosses on statutory terms; special mitigation based on extreme emotional distress requires both extreme emotion and an objectively reasonable loss of self-control.**

State v. Lambdin, 2017 UT 46 (Durham). Lambdin had a rocky marriage, but tried to work things out, even after he found out that she was pregnant with another man's child. When his reconciliation attempts were unsuccessful, he wrote two notes apologizing for the murder he was about to commit. Seven hours after writing the letters, he killed his wife. He admitted the murder, but claimed special mitigation based on extreme emotional distress. The jury instructions on special mitigation included both the statutory language and caselaw glosses on that language—that the emotion must be "severe," accompanied by "behavioral changes," and must be objectively reasonable under the circumstances. The Utah Supreme Court upheld the correctness of the instructions, noting that caselaw is law.

**When a defendant claims ineffective assistance regarding an elements instruction, he must show *Strickland* prejudice.**

State v. Garcia, 2017 UT 53 (Pearce). Garcia got mad at his cousin and did a drive-by shooting at his cousin's house. Garcia was charged with attempted murder, and argued incomplete self-defense, which would make his crime attempted manslaughter. The elements instruction for attempted manslaughter incorrectly stated that the jury had to convict of attempted manslaughter if it found that "the affirmative defense of imperfect self-defense" did not apply (in reality, they would have to convict if it did). Garcia appealed, claiming that his counsel was ineffective for not objecting to the attempted murder elements instruction. The State conceded deficient performance, but argued that it was not prejudicial in light of all the evidence of Garcia's guilt. The court of appeals agreed with Garcia that counsel was ineffective. The Utah Supreme Court granted review and reversed, holding no prejudice from the incorrect instruction, and making clear that jury instruction errors—even those that concern an element of an offense—raised under ineffective assistance require defendants to prove *Strickland* prejudice.

**Counsel is not ineffective for not seeking to limit the State's trial theories to those presented at preliminary hearing; an incorrect mental state for nonconsent was harmless where the evidence showed at least the required recklessness; and counsel can conclude that a mental state added to the end of an elements instruction applies to all of the previous elements.**

State v. Reigelsperger, 2017 UT App 101 (Pohlman). Reigelsperger kidnapped and raped his estranged wife. The jury instructions for the sexual offenses included different statutory theories of nonconsent, all of which were in the information, but not all of which had been discussed at preliminary hearing. Counsel was not ineffective for not seeking to limit the State's theories at trial because no settled law limited the State at trial to theories it presented at preliminary hearing. Reigelsberger also argued that the instructions on nonconsent did not have a mental state. Though this was error, it was harmless where the evidence overwhelmingly showed that Reigelsberger acted at least recklessly as to nonconsent. Reigelsberger finally argued that the aggravated kidnapping instruction was obviously

erroneous because it did not outline the mental state for each element separately; but because the mental state was at the end, counsel could have decided (based on *State v. Marchet*) that the mental state applied to all the elements.

**Jury instructions can contain theories supported by the evidence, even if the prosecution does not argue them.**
**State v. Carrell, 2018 UT App 21 (Harris).** Carrell drove a school bus for special needs children. Video aboard the bus showed him lingering over the victims and putting his hands on them. The jury was correctly instructed on all the elements of the offense, but Carrell argued that the instructions should not have included alternatives (such as indecent liberties) that the prosecutor did not argue. Though the prosecutor did not argue indecent liberties, the evidence supported it, so no error.

## JURY SELECTION

**A trial court abuses its discretion by refusing to let the defense ask each member of the jury venire about their experience with serious car accidents in a case involving a serious car accident.**
**State v. Holm, 2017 UT App 148 (Pohlman).** Holm got into a fight with his wife and drove angry in his large truck. When he came to a red light, he gunned it, hitting and killing another driver. During jury selection, defense counsel asked the venire whether they or anyone they knew was involved in a serious car accident. Many of them raised their hands. The court then asked if that experience would potentially bias any of them. Defense counsel wanted to talk to each potential juror who had said they had experience with a serious accident, but the court only let counsel speak with those who indicated potential bias. The court of appeals held that the court abused its discretion, because the purpose of voir dire is to find out both (1) actual bias and (2) information helpful to determine peremptory challenges. The trial court should have allowed more individual follow-up, because it would have aided Holm in ferreting out information relevant to both purposes.

## JUVENILE LAW

**The State has the burden of proving the validity of a minor's waiver of his *Miranda* rights based on a totality of the circumstances, measured by the following factors: age, intelligence, education, experience, ability to comprehend, use of coercive tactics, and presence of a supportive adult.**
**State v. R.G. and D.G., 2017 UT 79 (Durham).** R.G. and D.G. sexually assaulted a classmate. They each confessed after waiving their *Miranda* rights. The supreme court upheld the validity of the waiver based on the totality of the circumstances, measured by the following factors: age, intelligence, education, experience, ability to comprehend, use of coercive tactics, and presence of a supportive adult. The State has the burned to prove a valid waiver, though the

minor may produce evidence to undermine that conclusion or to rebut the rule-based presumption that a minor of at least 14 years of age is capable of waiving *Miranda* rights without an adult present.

## MERGER

**Whether something is a lesser-included offense for purposes of obtaining a defense-requested jury instruction is irrelevant to whether it is a lesser-included offense for purposes of merger.**
**State v. Calvert, 2017 UT App 212 (Pohlman).** Calvert pointed a gun at and threatened a group of children and, later, the children's uncle. Calvert was convicted of aggravated assault and threatening with a dangerous weapon. Counsel was not ineffective in not raising a double jeopardy challenge because it would have been futile. Threatening with a dangerous weapon is not necessarily included in aggravated assault because it has a unique element—the presence of two or more people. Thus, threatening with a dangerous weapon does not merge with aggravated assault, even if it may be a lesser-included offense for purposes of submitting a defense-requested instruction to the jury.

## POST-CONVICTION

**Under a newly-discovered evidence claim, equivocal, contradictory evidence cannot establish that no reasonable jury could have found the defendant guilty.**
**State v. Lynch, 2017 UT App 86 (Christiansen).** Lynch bought a white truck, hit his wife with it and killed her, hid the truck, then went onto the news pleading for help finding the driver of the mysterious white truck. Lynch's girlfriend saw him on the news and told police about his truck. After losing at trial and on appeal, Lynch filed a post-conviction petition based in part on newly discovered evidence about his truck. His claims failed because he presented some evidence of the condition of his truck five years after the incident, with no evidence that the truck had been unaltered. Other evidence about the police investigation was equivocal and contradictory. While some of it could support Lynch, it was not so compelling as to demonstrate that no reasonable jury could have found Lynch guilty.

**A defendant knows or should know of facts he personally experiences and cannot base a newly-discovered evidence claim on later becoming aware of those facts.**
**Leger v. State, 2017 UT App 217 (Mortensen).** Leger beat, strangled, and raped a woman. When he was arrested, he told police that it was consensual rough sex. He pleaded guilty to attempted aggravated sexual assault, but five years later filed for post-conviction relief arguing his plea was unknowing because he was coerced and because the State allegedly withheld a police report of a prior strangulation of the same victim where Leger had told police that it was consensual rough sex. But Leger's claims were time-barred. He knew or should have known that he was coerced to enter the plea when it happened. And he knew or should have known when he pleaded guilty that he had earlier raised a similar defense when speaking with police, and that police would likely have created a report. He thus could have brought his petition within a

year after the last day for filing an appeal from his conviction.

## PRELIMINARY HEARINGS

**The State can rely on inferences to show probable cause that an untested substance was a controlled substance.**
State v. Homer, 2017 UT App 184 (Harris). An officer pulled Homer over. Homer showed signs of intoxication—rubbing her arms, chewing her cheek, speaking inarticulately, etc. Homer gave consent to search her truck; inside, the officer found syringes and a baggie with a light crystal substance that in the officer's training and experience appeared to be meth. The substance was not field-tested or lab-tested before prelim, and the magistrate refused bindover on that basis. The State appealed, and the court of appeals reversed, holding that the State can rely on reasonable inferences to prove that an as-yet-untested substance is a drug.

## PRISONER LITIGATION

**Successful prisoner litigants in civil rights cases must pay attorney's fees out of at least 25% of their judgments before the defendants must pay anything.**
Murphy v. Smith, 16-1067 (Gorsuch). A federal statute says that when a prisoner prevails and gets a money judgment, "up to" 25% of that judgment shall be applied to attorney's fees. The Supreme Court held that this means that once attorneys fees are figured out, the court must apply 25% of the judgment to that total before turning to the defendants to satisfy the remaining amount (if any).

## PROBATION

**Cognitive difficulties do not automatically render a defendant incapable of complying with probation conditions. Also, due process is satisfied in probation revocation hearing when the defendant has the opportunity to present evidence and argument, and the court states the reasons for it ruling.**
State v. Hoffman, 2017 UT App 173 (Pohlman). Hoffman violated his probation and was discharged from sex-offender therapy. The district court found his violations were willful. It gave Hoffman a chance to explore other treatment options, but when counsel presented only outpatient treatment options, the court revoked his probation. The court's willfulness determination was not clearly erroneous because, even though Hoffman had cognitive difficulties, evidence indicated that he was capable of complying with the terms of his probation. The court did not abuse its discretion in revoking probation because it considered Hoffman's arguments and explained its reasons for rejecting them.

## PROSECUTORIAL MISCONDUCT

**Appellate courts do not review a prosecutor's actions directly—they review the trial court's response (or lack thereof) to them.**
State v. Hummel, 2017 UT 19 (Lee). Hummel claimed on appeal that the prosecutor committed misconduct by presenting improper evidence and argument. The Supreme Court made clear that appellate courts review the rulings of trial courts, not the actions of prosecutors directly. Most of these claims were unpreserved and not addressed on that basis.

**A prosecutor does not elicit false testimony by asking a victim to say what she understood a text message from a defendant to mean.**
State v. Allgood, 2017 UT App 92 (Toomey). Allgood molested his girlfriend's daughter for many years, often under the guise of "tucking" her into bed, even after she was a teenager. One night, he texted and said that he was excited to tuck her in that night. This message was lost before trial, but the victim testified that the text referred to sex. Allgood claimed that this was false, because an officer had seen the text before it was deleted and said it did not refer to sex. But it was not false—at least not obviously so—the court of appeals explained, because the prosecutor asked the victim what the text was about, not exactly what it said.

**A prosecutor does not commit misconduct by clarifying a defendant's testimony in contrast to other evidence, and by noting that defendant's story at trial did not come out while speaking with an officer. He should not, however, ask a victim about his thoughts of family during an attack.**
State v. Fairbourn, 2017 UT App 158 (Mortensen). An officer saw Fairbourn walking in the middle of the street and thought it strange. He followed Fairbourn, who became agitated, pulled out a knife with a seven-inch blade, and told the officer he was "about to fucking die." The officer shot him three times in self-defense. Fairbourn was charged with attempted aggravated murder. When he was in the hospital, he told the officer he thought he was in dead and went to hell, but otherwise invoked his *Miranda* rights. At trial, Fairbourn said that he didn't threaten the officer and tried to surrender. The officer asked Fairbourn if he had said anything about surrendering when speaking with the officer at the hospital. He also asked Fairbourn clarifying questions about his testimony in contrast to that of witnesses who had corroborated the officer's story. The prosecutor also asked the officer what was going through his mind when Fairbourn threatened him; the officer said that he wanted to go home to his family and was concerned that Fairbourn was within 21 feet of him at the time of the threat, which in the officer's training constituted the "kill zone." Fairbourn claimed prosecutorial misconduct for three reasons. First, for commenting on Fairbourn's silence—this was not plain error because Fairbourn admitted to speaking with the officer, which is not silence. Second, asking Fairbourn to comment on the other witness's testimonies—these were clarifying questions, and not outright accusations that Fairbourn was lying. Third, asking the officer about his thoughts—this was improper because it was irrelevant, but not prejudicial where the evidence of guilt was strong and the testimony was not emphasized. Fourth, the 21-foot rule

testimony was relevant to show the officer's state of mind and why he acted as he did.

**A prosecutor did not plainly commit misconduct for various reasons.**
State v. Ringstad, 2017 UT App 199 (Christensen). Ringstad lived with his wife and her two daughters. Ringstad abused both girls for many years, and was also unfaithful to his wife in other ways. Ringstad admitted abusing the victim when he spoke with police. During closing argument, the prosecutor made several remarks, none of which defense counsel objected to. The first was saying that he thought it was "despicable" that the defendant claimed that the victim was "spooning" and "grinding" him at the time of the abuse. Not objecting was reasonable because it could have emphasized the remark and it was not prejudicial because Ringstad confessed. It was also not plainly wrong for the prosecutor to say "penis" rather than, as the defendant had said, "private," because this was a reasonable inference from the evidence. It was further not improper to refer to LDS temple and family matters because it showed why the victim chose to disclose the abuse. Finally, it was not plainly wrong for the prosecutor to refer to personal experiences in order to illustrate a point in closing and as a fair reply to defense counsel.

## RESTITUTION

**Lost income is only recoverable in restitution if it results from bodily injury. Psychological injury is not enough**
State v. Wadsworth, 2017 UT 20 (Lee). Wadsworth sexually abused a victim, and the trial court ordered restitution for her lost wages as a result of depression stemming from the abuse. Under the restitution statute, lost wages are recoverable only if they resulted from "bodily injury" to a victim. The victim here did not suffer bodily injury, so lost wages were not available.

**A complete restitution order made as part of a plea in abeyance is a final order and may be appealed as of right; court-ordered restitution orders are not final and appealable unless and until there is a guilty plea.**
State v. Moores & Becker, 2017 UT 36 (Himonas). Moores and Becker both entered pleas in abeyance that included restitution orders. The State had argued that because pleas in abeyance are not final orders, they could not challenge the restitution orders. The Supreme Court disagreed, holding that complete restitution orders are separately final and appealable. However, the court explained that court-ordered restitution in pleas in abeyance cases was not separately appealable, because it was a condition of a plea.

**A defendant challenging a restitution order by means of a 60(b) motion may only appeal the denial of 60(b) relief, not the underlying order.**
State v. Speed, 2017 UT App 176 (Roth). Speed was convicted of stealing a bunch of cell phones and faced a six-figure restitution amount. He did not file a motion requesting a restitution hearing until after he was convicted, sentenced, and on probation. He then filed a rule 60(b)(4) motion claiming that the order was void for lack of jurisdiction because the court relied on incomplete information and did not hold a hearing; that he lacked notice; and that his

counsel was ineffective. But these assertions of legal error during the sentencing process did not, even if true, deprive the court of jurisdiction. The order was thus not void and the trial court did not abuse its discretion by refusing to grant relief on that basis.

**Absent an agreement or admission, a person convicted of theft by receiving cannot be held liable for restitution on the underlying theft.**
State v. Gibson, 2017 UT App 142 (Toomey). Gibson received and sold a bunch of scrap copper to a metals recycling place. The company from whom the copper was stolen filed a restitution request for $13,000--$700 for the copper, $300 for some fencing, and $12,000 for labor costs. The trial court ordered Gibson to play the full $13,000 in restitution. He challenged this on appeal, saying that he was liable only for restitution to the metals recycling company, because that was all that he had admitted guilt for/been convicted of. The court of appeals agreed, explaining that Gibson could not be held liable for the underlying theft under the restitution statute.

**Just as in a civil case, a defendant bears the burden of proving entitlement to an offset once the State has proven the baseline restitution amount.**
State v. Bird, 2017 UT App 147 (Pohlman). Bird conned his neighbors into sinking a bunch of money in a hand lotion company that he was a salesman for, saying that he had put half a million of his own money in the venture, when he really hadn't paid a cent. The company went under, and the victims lost everything, despite diligent efforts to make the business succeed. The trial court ordered restitution in the amount of the victim's original investment, minus the value of some equipment that they got from the business. Bird claimed that he was entitled to an additional offset for the value of the lotion inventory, which he believed was worth over one million dollars. The trial court found that the lotion was worthless because the FDA found bacteria in some of it and forbad it from being sold. The court of appeals affirmed, holding that Bird had the burden to prove the offset, and that the trial court did not err in not granting the offset for the ultimately useless lotion.

**A plea to failure to respond to an officer's signal to stop does not make the defendant liable for impound fees imposed on the victim's vehicle after the crime.**
State v. Trujillo, 2017 UT App 151 (Orme). Trujillo pled guilty to felony evading. After the chase, the victim's car was impounded and racked up $2500 in impound fees. The State requested restitution for the impound fees, and the district court ordered it. The court of appeals reversed, holding that a plea to evading did not show that Trujillo admitted to causing the impound fees—he had not admitted stealing the car or abandoning it long enough to require impound.

**Defense counsel is ineffective by not seeking greater detail on testimony supporting a restitution award where part of the award was proper, but part of it as clearly not.**
State v. Jamieson, 2017 UT App 236 (Harris). Jamieson was convicted of a computer crime and ordered to pay six figures of restitution. Much of that was based on the victim's time spent (1) determining the extent of the damage and (2) attending court hearings. The first kind of

restitution is proper, but the second is not. Jamieson claimed that his counsel was ineffective for not delving deeper and figuring out which portion of the restitution claim was proper. The court of appeals agreed.

**To prove entitlement to restitution, the burden is on the victim or the State to show proximate cause, and the finding cannot be based on speculative evidence.**
State v. Ogden, 2018 UT 8 (Pearce). Ogden sexually abused a girl who was later sexually abused by another man. In setting restitution at over two million dollars, the court considered the likely therapy, drugs, hospital stays, etc. that the victim would likely need for the rest of her life. For a long time, the court of appeals has used a "modified but-for" test for restitution, with a fairly low standard of proof for the nexus between a crime and the restitution. The supreme court disagreed with that standard and imposed a proximate cause standard instead. The court also explained that there needed to be a basis in the evidence beyond speculation when determining future costs.

**Fair market value is not measured by value in a second-hand market or the price one could get in a forced sale; fair market value for a partially-customized car may be determined by adding the value of any improvements to the purchase price.**
State v. England, 2017 UT App 170 (Pohlman). A man bought a 1995 Eagle Talon to customize for his son's sixteenth birthday. He left the car with his mechanic and paid for work as it was done on the car. England bought out the mechanic, and he sold the partially-customized car to a scrap yard for $300 without the car-owner's consent. At the time, the car did not have an engine; the mechanic had taken it out and sent it to a machinist. The court ordered restitution based on the purchase price of the used car plus the value of the modifications that had been added to the car. The court of appeals affirmed that calculation but remanded for the trial court to deduct the value of the engine, which England never took.

**Courts do not have authority to address the merits or legality of restitution orders from the Board of Pardons and Parole.**
State v. Garcia, 2018 UT 3 (Lee). Garcia completed a sentence for automobile homicide. Months later, the Board of Pardons and Parole ordered him to pay $7,000 in funeral expenses to the victim's family. The district court entered the order on its docket. Garcia filed several motions challenging the legality of the order, arguing it was issued beyond the 60-day post-release statutory limit, but the court denied them. The supreme court ruled that under Utah Code section 77-27-5(3), courts lack jurisdiction to review the merits or validity of any restitution orders from the Board. The courts have only the authority to enter the order on its judgment docket and facilitate civil collection remedies.

## RIGHT TO COUNSEL

**An obstreperous defendant does not knowingly waive his right to counsel if the trial court does not conduct a detailed colloquy and make appropriate findings.**
State v. Smith, 2018 UT App 28 (Pohlman). Smith went through a string of attorneys because

he kept threatening them when he didn't get what he wanted. After his fourth attorney withdrew and LDA had yet assigned a new one, the court held a hearing on his motion to withdraw his plea. The prosecutor asked the court to find that Smith had forfeited his right to counsel, or in the alternative, to warn him that he would forfeit his right if he kept threatening his attorneys. The trial court did not take the State's advice, but instead tried to tell Smith about the dangers of self-representation. Smith didn't cooperate, but the court went forward with the hearing anyway, denied the motion to withdraw, and sentenced Smith. This violated Smith's right to counsel, because it was not a true waiver, and the court did not find forfeiture.

## SECURITIES & FINANCIAL FRAUD

**Corruptly endeavoring to obstruct or impede the due administration of the Internal Revenue Code requires a nexus between the defendant's conduct and a particular administrative proceeding.**
**Marinello v. United States, 16-1144 (Breyer).** A clause in §7212(a) of the Internal Revenue Code makes it a felony to "corruptly . . . endeavor[] to obstruct or imped[e] the due administration of this title." By a 7-2 vote, the Court held that to obtain a conviction under this provision the government must prove "that there is a 'nexus' between the defendant's conduct and a particular administrative proceeding, such as an investigation, an audit, or other targeted administrative action." Without that requirement, found the Court, §7212(a) would convert into felonies "numerous misdemeanors, ranging from willful failure to furnish a required statement to employees, §7204, to failure to keep required records, §7203, to misrepresenting the number of exemptions to which an employee is entitled on IRS Form W–4, §7205, to failure to pay any tax owed, however small the amount, §7203."

## SENTENCING

**When a trial court fails to make the consecutive/concurrent determination at sentencing, the court can correct that failure at any time as the sentence is illegal under rule 22(e).**
**State v. Watring, 2017 UT App 100 (Toomey).** Watring was convicted of drug offenses and placed on probation. While on probation, he committed another drug offense, and was kept on probation. The minute entry for this most recent sentencing stated that the offense would run concurrent with the prior offenses. When Watring did not comply with treatment on probation, the court imposed the original sentences and sent Watring to prison. The court also corrected what it understood was a clerical error stating that the second offense would run concurrent with the first, found that it had failed to make a concurrent/consecutive determination, and corrected that sentence to be consecutive. The court of appeals upheld the court's authority to correct the prior illegal sentence and to find that the minute entry was the result of a clerical error, as the record showed no judicial reasoning or decision.

**Trial courts can consider reduced and dismissed charges at sentencing.**
**State v. Valdez, 2017 UT App 185 (Mortensen).** Valdez was sentenced on three separate cases

arising from three different plea bargains. The plea bargains involved dismissing some charges and reducing others. At sentencing, the court considered Valdez's actual conduct, not just what he pled to. This was proper, the court of appeals held, because trial courts can consider the nature and circumstances of the offenses at sentencing.

**A defendant cannot complain that the trial court did not consider mitigating evidence that he never presented to the court.**
State v. Galindo, 2017 UT App 117 (Voros). Over a two-year period, Galindo repeatedly had sex with his girlfriend's teenage daughter. The court sentenced him to consecutive sentences. Galindo argued that the court based its conclusion on the prosecutor's inaccurate reference to the victim as Galindo's step-daughter, and that the court did not consider all relevant factors. But Galindo could not prove prejudice: he was a father-figure even if he wasn't legally a step-father; and the court considered all the mitigating evidence that Galindo chose to present.

**Under an interests-of-justice analysis in deciding whether to depart from a presumptive sentence, courts are required only to consider factors presented by the parties.**
State v. Martin, 2017 UT 63 (Himonas). Martin groped his two young sisters-in-law and was convicted of aggravated sexual abuse. The sentencing scheme set a presumptive sentence of 15 to life but gave the court discretion to impose a 10-to-life or 6-to-life sentence if doing so was in the interests of justice. Assuming the interest-of-justice analysis of *State v. LeBeau* applied, the court was only required to consider factors and arguments presented by the parties, and it did not abuse its discretion in its weighing of the argued factors.

## SIXTH AMENDMENT—CONFRONTATION

**When a declarant testifies at trial, admission of his out-of-court statement does not violate the Confrontation Clause even if the declarant testifies that he cannot remember making the statement or the subject matter of his statement.**
State v. Reyos, 2017 UT App 132 (Toomey). Reyos killed a sixteen-year-old boy. Reyos's protégé told police in a recorded interview that Reyos confessed to the murder, and the protégé signed a statement to that effect. But at trial, he said he did not remember talking to Reyos or the police, though he admitted that the voice on the recording sounded like his and the signature looked like his. Reyos argued that admission of the out-of-court statement violated the Confrontation Clause because the witness was functionally unavailable due to his lack of memory, and because he had no meaningful opportunity to cross-examine him. The court rejected the argument, holding that the protégé was available because he testified at trial, and Reyos still had a meaningful opportunity to cross examine him even though the protégé said he could not remember anything.

**A confrontation error can be harmless beyond a reasonable doubt where the contested evidence is cumulative.**
State v. Farnworth, 2018 UT App 23 (Hagen). Farnworth (who was driving a big SUV) got in a road rage confrontation with a motorcyclist. The motorcyclist lost, and Farnworth sped away.

Five different eyewitnesses testified about what happened, but one witness did not come to trial, so the State played her 911 call about the crash. Farnworth argued that this violated both hearsay rules and his confrontation right. Even assuming a confrontation violation, any error was harmless beyond a reasonable doubt because the 911 call was cumulative of other witness's testimony.

## SIXTH AMENDMENT - INEFFECTIVE ASSISTANCE OF COUNSEL

**When a public trial violation is based on exclusion of the public from jury selection and raised in the context of ineffective assistance, prejudice is not presumed, but the defendant must prove Strickland prejudice.**

**Weaver v. Massachusetts, 16-240 (Kennedy).** By a 6-2 vote, the Court held that petitioner, whose counsel performed deficiently by failing to object when his trial was closed to the public for two days of the jury selection process, could not show that he was prejudiced by his counsel's deficient performance — even though the underlying constitutional violation (courtroom closure) is considered a structural error (*i.e.*, an error not subject to harmless-error review). Petitioner contended that prejudice should be presumed under *Strickland* whenever the deficient performance is failure to preserve or raise a structural error. The Court disagreed, explaining that errors have been deemed structural for at least three broad reasons: (1) because the right protects an interest other than "to protect the defendant from erroneous conviction"; (2) because "the effects of the error are simply too hard to measure"; and (3) because "the error always results in fundamental unfairness." The Court held that even assuming structural errors in the final category are presumptively prejudicial under *Strickland*, the public-trial right does not fall within that category because "not every public-trial violation will in fact lead to a fundamentally unfair trial." Finally, the Court found that petitioner failed to show actual *Strickland* prejudice (*i.e.*, "a reasonable probability that the jury would not have convicted him if his attorney had objected to the closure") or a fundamentally unfair trial.

**When a criminal defendant is affirmatively misadvised about the deportation consequences of his guilty plea, he can prove prejudice under Hill v. Lockhart even if the evidence of guilt is overwhelming.**

**Lee v. United States, 16-327 (Roberts).** By a 6-2 vote, the Court held that a noncitizen defendant who was misadvised that pleading guilty to a particular crime would not result in deportation (when in fact it results in mandatory deportation) can show prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984), and *Hill v. Lockhart*, 474 U.S. 52 (1985), even when the evidence of guilt was overwhelming. Under *Hill*, a defendant must show "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." The Court rejected the Sixth Circuit's holding here that because the evidence of guilt was overwhelming, petitioner could not show it would have been rational to go to trial to avoid removal. The Court stated that "common sense (not to mention our precedent) recognizes that there is more to consider than simply the likelihood of success at trial." And the Court found that petitioner showed prejudice here, given that "'deportation

was the determinative issue in [his] decision whether to accept the plea deal,'" he had strong connections to the United States and none to the country where he would be deported to (South Korea), and the "consequences of taking a chance at trial" were merely "a year or two more of prison time."

**Ineffective assistance of appellate counsel cannot save a procedurally defaulted claim in federal habeas.**

**Davila v. Davis, 16-6219 (Thomas).** In *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), the Court held that ineffective assistance by state post-conviction counsel can serve as cause to overcome the procedural default of a substantial ineffective-assistance-of-trial-counsel claim. By a 5-4 vote, the Court here declined to extend that exception to procedurally defaulted, but substantial, ineffective-assistance-of-*appellate*-counsel claims. The Court stated that *Martinez* relied on the "unique importance of protecting a defendant's . . . right to effective assistance of *trial* counsel"; and distinguished appellate-counsel claims from trial-counsel claims because at least one court — the trial court — will have addressed the alleged errors the form the basis of the former. The Court added that the proposed extension of *Martinez* "would mean that *any* defaulted trial error could result in a new trial," which "would exceed anything the *Martinez* Court envisioned when it established its narrow exception to *Coleman* [*v. Thompson*]."

**Counsel performs deficiently in a forcible sexual abuse case by not insisting that the court either define or remove "indecent liberties" from a jury instruction.**

**State v. Ray, 2017 UT App 78 (Orme).** Ray was charged with various sex offenses involving a fifteen-year-old girl whom he romanced with, among other things, rose petals, a vibrator, and watching Twilight: New Moon while naked together. The jury instructions on forcible sexual abuse included, but did not define, an "indecent liberties" theory. Defense counsel did not object to the instruction, and neither party argued indecent liberties, relying solely on a touching theory. On appeal, Ray argued that the jury might have been confused by the "indecent liberties" language, and that counsel was ineffective for not seeking to define it or excluding it all together. The court of appeals agreed that counsel was objectively deficient for not doing so, and that this failure prejudiced Ray because there is no telling whether the jury relied on an improper theory or not, and the jury actually acquitted of other counts.

**When a defendant claims ineffective assistance regarding an elements instruction, he must show *Strickland* prejudice.**

**State v. Garcia, 2017 UT 53 (Pearce).** Garcia got mad at his cousin and did a drive-by shooting at his cousin's house. Garcia was charged with attempted murder, and argued incomplete self-defense, which would make his crime attempted manslaughter. The elements instruction for attempted manslaughter incorrectly stated that the jury had to convict of attempted manslaughter if it found that "the affirmative defense of imperfect self-defense" did not apply (in reality, they would have to convict if it did). Garcia appealed, claiming that his counsel was ineffective for not objecting to the attempted murder elements instruction. The State conceded deficient performance, but argued that it was not prejudicial in light of all the evidence of

Garcia's guilt. The court of appeals agreed with Garcia that counsel was ineffective. The Utah Supreme Court granted review and reversed, holding no prejudice from the incorrect instruction, and making clear that jury instruction errors—even those that concern an element of an offense—raised under ineffective assistance require defendants to prove *Strickland* prejudice.

**When the admissibility of eyewitness testimony is a close question, counsel is not ineffective in letting it go to the jury; however, counsel is ineffective in not moving for a mistrial when a witness volunteers incriminating statements from codefendants.**
**State v. Craft, 2017 UT App 87 (Roth).** Craft and two other assailants broke into a house at night, woke a man by hitting him in the head with a gun, and searched his room. They forced him into another room then made him and his mother, whom they had dragged out of her bed, kneel on the ground and keep their heads down as the assailants rummaged around. The assailants were masked, but at some point Craft took his mask off. In ambient light from a nearby closet, the man was able to see Craft's face for five to ten minutes in his peripheral vision. Several hours later, police showed the man a photo line-up, one photo at a time, with Craft and five other similar-looking people. The man identified Craft. The court held that despite some problems with the viewing conditions and photo line-up, the identification was admissible under the controlling *Ramirez* test. At the very least, counsel was not ineffective for not challenging admissibility of this close question. Letting it go to the jury allowed counsel to avoid an evidentiary hearing where the witness could rehearse his testimony and solidify his identification of Craft. However, when the prosecutor asked the detective how he selected the foils to include in the photo line-up, the detective misunderstood and said that Craft's codefendants said Craft was at the crime scene. The court held that counsel was ineffective for not moving for a mistrial because the statement went to the heart of Craft's defense—his presence at the crime scene—and the evidence of guilt was not overwhelming.

**Counsel was not ineffective for not delving into a teenage victim's sexual activity with another teenager because this could have strengthened the State's arguments for defendant's guilt.**
**State v. Allgood, 2017 UT App 92 (Toomey).** Allgood molested his girlfriend's daughter for many years, often under the guise of "tucking" her into bed, even after she was a teenager. Before trial, counsel stipulated not to explore the victim's sexual activity with her teenage boyfriend. On appeal, Allgood argued that this was ineffective, but the court of appeals disagreed, explaining that the prosecutor might have used her sexual activity to explain why Allgood would be so jealous of her boyfriend and argue that his abuse had prompted her to become sexually active. Allgood also argued that counsel was ineffective for not objecting when the victim's mother testified that an officer told her that he had pulled Allgood over while driving a car with the victim inside in the early morning hours and that the victim was in a "compromising position." This was not unreasonable, the court of appeals explained, because had defense counsel objected, the State would have merely called the officer, who could have given greater (and more damaging) detail about the stop.

**When a defendant pleads guilty, strong evidence of his guilt makes it nearly impossible for him to prove prejudice on ineffective assistance claims regarding the plea.**
**Gray v. State, 2017 UT App 93 (Voros).** Gray used cocaine and alcohol for days on end, then stabbed his girlfriend 67 times, mutilated her body, cleaned up the crime scene, and fled. He pled guilty to aggravated murder and other crimes in exchange for the State not seeking the death penalty. He did not appeal. In postconviction, he argued that his counsel was ineffective for not researching mental illness defenses, but he provided no expert testimony about mental illnesses he actually suffered and did not argue how those illnesses would have excused or mitigated his criminality. Further, the record showed that counsel had actually investigated mental illness issues. The trial court granted summary judgment to the State, and the court of appeals affirmed, holding that Gray's speculation could not overcome the *Strickland* presumption of reasonably effective assistance, and that he could not prove that he would not have pled guilty given the overwhelming evidence of guilt and his desire to avoid the death penalty.

**Counsel is not ineffective for not seeking to limit the State's trial theories to those presented at preliminary hearing; an incorrect mental state for nonconsent was harmless where the evidence showed at least the required recklessness; and counsel can conclude that a mental state added to the end of an elements instruction applies to all of the previous elements.**
**State v. Reigelsperger, 2017 UT App 101 (Pohlman).** Reigelsperger kidnapped and raped his estranged wife. The jury instructions for the sexual offenses included different statutory theories of nonconsent, all of which were in the information, but not all of which had been discussed at preliminary hearing. Counsel was not ineffective for not seeking to limit the State's theories at trial because no settled law limited the State at trial to theories it presented at preliminary hearing. Reigelsberger also argued that the instructions on nonconsent did not have a mental state. Though this was error, it was harmless where the evidence overwhelmingly showed that Reigelsberger acted at least recklessly as to nonconsent. Reigelsberger finally argued that the aggravated kidnapping instruction was obviously erroneous because it did not outline the mental state for each element separately; but because the mental state was at the end, counsel could have decided (based on *State v. Marchet*) that the mental state applied to all the elements.

**Counsel was not ineffective for stipulating to admission of 404(b) evidence that the defendant had raped the victim's sister where the defendant had admitted raping the victim and counsel tried to convince the jury that the victim and her sister were being manipulated by their mother as revenge against the defendant for his infidelity.**
**State v. Ringstad, 2017 UT App 199 (Christensen).** Ringstad lived with his wife and her two daughters. Ringstad abused both girls for many years, and was also unfaithful to his wife in other ways. Ringstad admitted abusing the victim when he spoke with police. At trial, when the State called the victim's sister to testify of Ringstad's abuse of her, defense counsel did not object. This was not deficient performance because counsel faced the difficult hurdle of injecting reasonable doubt into a case where his client confessed. Because the girls did not

show outward signs of abuse, he argued that they were not actually abused, but their mother had manipulated them into fabricating the abuse in revenge for his infidelity and an attempt to get a favorable divorce settlement.

**Defense counsel is not ineffective for chosing an all-or-nothing defense.**
State v. Hull, 2017 UT App 233 (Christensen). Hull asked the victim for a ride to a gas station, saying that he knew the homeowner's daughter. Homeowner's brother later went to the house and saw Hull in the back yard, saying he had not been in the house. Inside the house, various items had been gathered together in an empty trash can—food, an iPad, etc.--and other items were missing. Hull was convicted of burglary, and claimed that his counsel was ineffective for not seeking a lesser-included offense instruction on criminal trespass. No ineffective assistance because counsel could reasonably choose to try an all-or-nothing defense.

**Defense counsel is ineffective by not seeking greater detail on testimony supporting a restitution award where part of the award was proper, but part of it as clearly not.**
State v. Jamieson, 2017 UT App 236 (Harris). Jamieson was convicted of a computer crime and ordered to pay six figures of restitution. Much of that was based on the victim's time spent (1) determining the extent of the damage and (2) attending court hearings. The first kind of restitution is proper, but the second is not. Jamieson claimed that his counsel was ineffective for not delving deeper and figuring out which portion of the restitution claim was proper. The court of appeals agreed.

**Counsel is deficient when he does not challenge inadmissible, important evidence that is central to the dispute.**
State v. Scott, 2017 UT App 74 (Toomey). Scott shot and killed his wife, and he argued that he did it under extreme emotional distress. Scott and his wife had been arguing for several weeks. The day before Scott shot his wife, he saw her crouched by their open gun case and her gun was not there. Scott also said his wife had threatened him that day. The next day, Scott "snapped" and shot his wife when she started yelling at him. At trial, the court ruled that the content of the wife's earlier threat was hearsay. The court of appeals held that defense counsel was deficient for not arguing that the threat was non-hearsay—it was used to show its impact on Scott. The threat was an important piece of evidence that "would only have strengthened Scott's defense." The court found prejudice because the threat went to the central dispute, and the jury had sent a note at one point saying it was deadlocked over whether Scott substantially caused his own distress.

**Counsel can reasonably decide to argue deficiencies in the State's investigation rather than investigate or put on witnesses who only hint at the existence of other suspects.**
State v. Lynch, 2017 UT App 86 (Christiansen). Lynch bought a white truck, hit his wife with it and killed her, hid the truck, then went onto the news pleading for help finding the driver of the mysterious white truck. Lynch's girlfriend saw him on the news and told police about his truck. After losing at trial and on appeal, Lynch filed a post-conviction petition, arguing that trial counsel was ineffective for not investigating and presenting witnesses or evidence on several

points relevant to whether his truck was the truck that killed his wife. One witness saw a red truck and heard a loud bump but did not actually see the incident; counsel reasonably decided not to track down that witness but instead pointed out that the police did not follow up with him. Lynch failed to prove prejudice on other claims about the truck because he presented evidence of the condition of his truck five years after the incident, with no evidence that the truck had been unaltered.

**Counsel is not deficient when, after weighing the pros and cons of one strategy over another, she decides that not calling an expert is most likely to work to the client's benefit.**
State v. Montoya, 2017 UT App 110 (Roth). Montoya murdered his ex-wife's boyfriend. Montoya and the boyfriend were both involved in gangs. Montoya argued ineffective assistance based on counsel not calling a gang expert to testify about the culture of retaliation in gangs to undermine the ex-wife's credibility. But counsel reasonably decided to rely on the extensive evidence that was already admitted about gangs, retaliation, and the ex-wife's motives to lie, and avoid overemphasizing gang activity with an expert and having the case devolve into "a gang trial." Nor was Montoya prejudiced by any deficiency, because of the extensive evidence and argument about retaliation and the ex-wife's motives to lie.

**If a defendant alleges that his trial counsel was ineffective for not moving to change venue, he must show that a juror was actually biased.**
State v. Millerberg, 2018 UT App 32 (Per curiam). Millerberg and his wife sexually abused their babysitter and injected her with drugs, killing her. They then hid the body. Millerberg claimed that his counsel was ineffective in various ways, including not filing a motion to change venue. But because he had not shown that any biased juror sat, he could not prove ineffective assistance.

**Any error or deficiency is harmless when the evidence of guilt is overwhelming, omitted evidence would be cumulative, and the defendant's testimony is implausible and undercut by evidence that he is lying.**
State v. Courtney, 2017 UT App 172 (Orme). Courtney was convicted of drug possession with intent to distribute and possession of drug paraphernalia. He challenged the admission of 404(b) evidence about another instance of drug distribution. He also argued that counsel was ineffective for not calling as a witness the alleged owner of an "owe sheet" that police found on Courtney. Any error or deficiency was harmless because Courtney himself testified that he had distributed drugs in the past, he gave implausible explanations for the paraphernalia and drugs he was caught with, his girlfriend already corroborated his claim that someone else owned the owe sheet, and the jury heard a recording of a phone call where Courtney tried to convince his girlfriend to lie at trial.

**A claim of ineffective assistance of counsel is not properly pursued under rule 22(e).**
State v. Wynn, 2017 UT App 211 (Mortensen). Six years after sentencing, Wynn filed a rule 22(e) motion arguing that his counsel was ineffective in not challenging restitution and in not ensuring that Adams did not serve time in state prison after finishing his concurrent federal

sentence. But rule 22(e) is not the proper vehicle to raise a claim of ineffective assistance.

**Counsel may reasonably divert resources away from issues that have only some value to the case but would not materially assist the case.**
Zaragoza v. State, 2017 UT App 215 (Harris). Zaragoza beat his wife with a baseball bat for two hours in a motel room. His wife spoke to police, but by the time of trial Zaragoza had convinced her to invoke the spousal privilege. Her statements were admitted under the doctrine of forfeiture by wrongdoing, then trial counsel called the wife to testify in his defense. After losing at trial and on appeal, Zaragoza filed a post-conviction petition raising several ineffective-assistance claims. The court rejected each claim: trial counsel's decision to call wife was a plausible tactical choice to effectively cross-examine wife about her statements to police; trial counsel could reasonably decide not to investigate surveillance video footage allegedly showing that Zaragoza was not in the motel for two hours, because it was undisputed that he was in the hotel and the State was not required to prove the length of time he was there; Zaragoza was not entitled to lesser-included offense instructions; a bill of particulars would not have forced the prosecution to elect whether it was proceeding under a kidnapping or unlawful detention theory; a one-year gap between charging and trial was not presumptively dilatory for a first-degree felony case; and appellate counsel cannot be deficient for not seeking certiorari review because there is no right to counsel for discretionary review.

**Counsel is not deficient for making an "untimely" objection when he would have been entitled to a continuance regardless of when he objected.**
State v. Roberts, 2018 UT App 9 (Pohlman). Roberts raped, sodomized, and sexually abused a child. The child's therapist testified. After about 30 minutes of testimony, including fact testimony interspersed with expert testimony, trial counsel objected because the State had not given notice that the therapist would testify as an expert. Trial counsel strategically chose to ask the court to strike the testimony rather than for a continuance. The trial court refused to strike the testimony because the objection was untimely. The court of appeals held that counsel was not deficient because the statute guarantees a continuance regardless of when counsel requests it, and it makes exclusion contingent on a showing of a deliberate violation of the notice statute, which was absent here.

**Sending a laptop supplied by the prosecutor into jury deliberations was not structural error.**
State v. Calvert, 2017 UT App 212 (Pohlman). Calvert pointed a gun at and threatened a group of children and, later, the children's uncle. When the court sent a recording of a 911 call back with the jury, the prosecutor offered to let the jury use his laptop to listen to it. The prosecutor stated that no information related to the case was on the laptop. Calvert couldn't prove prejudice because he presented no affidavits to show that jurors relied on extensive information, and any error was not structural.

**Trial counsel is deficient when he does not object to elements instructions that have the effect of reducing the State's burden of proof and there is no strategic benefit from so refraining.**
State v. Grunwald, 2018 UT App 46 (Hagen). Grunwald drove her truck while her boyfriend

shot and killed one officer and shot at several others. Grunwald was charged as an accomplice. The jury instructions mistakenly included a recklessness component when the principal offense did not allow for recklessness. The instructions also said that Grunwald could be convicted for intentionally aiding her boyfriend "who" committed the offense—rather than "to" commit the offense. And the instructions said Grunwald only needed to know that her boyfriend's conduct could result in the crimes, rather than saying that she had to be aware that her conduct could result in her boyfriend committing the crimes. The instructions had the effect of lowering the burden of proof, and there was no strategic reason not to object here. Counsel was deficient, but Grunwald only suffered prejudice on some of her convictions.

**Counsel is not ineffective in not requesting a cautionary instruction on uncorroborated accomplice testimony when trial court was not required to give one, and counsel effectively used the general instruction on witness testimony to make the same point.**
State v. Crespo, 2017 UT App 219 (Toomey). Crespo, a drug dealer, killed a woman who had accused him of rape. He had a friend facilitate a meeting with the woman, which was set up as a drug deal. The friend testified against Crespo. Counsel argued that the jury should not believe the friend's testimony for several reasons, but counsel did not ask for a cautionary instruction on uncorroborated accomplice testimony. The testimony was corroborated. The trial court had discretion to deny the instruction, and counsel acted reasonably in relying solely on the general witness testimony instruction.

**Counsel is not ineffective for not challenging the State's alternative indecent liberties theory, even though almost all the evidence and argument focused on a touching theory.**
State v. Carvajal, 2018 UT App 12 (Toomey). Carvajal, a middle-aged man, romanced an intellectually challenged 14-year-old girl. The girl testified that he touched her breast skin-to-skin. The State relied on a touching theory throughout trial, but the jury instructions permitted conviction based on indecent liberties (which was defined using MUJI). The prosecutor briefly referenced indecent liberties during closing. Carvajal claimed his counsel was ineffective for not trying to box the state in on a touching theory, but the State can proceed on alternate theories, so no IAC.

**Counsel is not required to request every lesser-included offense available.**
State v. Wilkinson, 2017 UT App 204 (Orme). Wilkinson was convicted of aggravated assault after repeatedly swinging a power drill at the victim. Counsel asked for a lesser-included offense for Class B misdemeanor assault, but not Class A misdemeanor assault, which would have required proof of substantial bodily injury. It was undisputed that the victim's injuries were minor, thanks to artful dodging on the part of the victim. No rule requires counsel to request every possible lesser-included offense. And choosing the Class B over the class A was especially reasonable where the facts did not fit the Class A scenario, and giving the jury the lowest possible option was to his benefit.

**Counsel can reasonably choose an all-or-nothing strategy and forgo a lesser-included offense. Also, counsel cannot be deficient for not advancing a theory or interpretation of the law which has not yet been settled or ruled upon by Utah courts.**

**State v. Bruun & Diderickson, 2017 UT App 182 (Roth).** Bruun & Diderickson entered into an agreement with the victims to purchase their property and form an LLC with the victims to develop it. Bruun & Diderickson then convinced the victims to let the LLC take out a hard-money loan using the property as collateral. Without authorization from the victims, Bruun & Diderickson spent some of that money on developments unrelated to the property. They were convicted of several counts of theft and pattern of unlawful activity. Counsel reasonably chose not to seek a lesser-included offense for wrongful misappropriation because it would have increased the defendants' chances of being convicted of some offense. Also, counsel reasonably did not ask for a jury instruction telling the jury that a pattern of unlawful activity must extend beyond one year, or that the jury must determine that it extended over a substantial period. No Utah case has defined "substantial period," and none has required courts to instruct jurors on that judicial gloss of the element that the offense be "continuing."

**Declining to investigate facts or hire an expert that would have undermined the defendant's chosen defense is reasonable, particularly where the defendant has already told his story to police and cannot change defenses without cost.**

**Leger v. State, 2017 UT App 217 (Mortensen).** Leger beat, strangled, and raped a woman. When he was arrested, he told police that it was consensual rough sex. He pleaded guilty to attempted aggravated sexual assault, but five years later filed for post-conviction relief arguing that he received ineffective assistance because his counsel did not hire a forensic nurse, who would have testified that the victim's injuries were from 3-5 days before she claimed to have been raped. But counsel reasonably decided not to do so because it would have been inconsistent with Leger's consent defense. Leger had already told that story to police, so changing strategies would have allowed the prosecutor to attack his stories as inconsistent.

**Counsel is not ineffective in not objecting to the accuracy of a translation during trial when he does not speak the language, no one at trial who speaks the language and English gave any indication of a problem, and the translation was consistent with preliminary hearing testimony.**

**State v. Aziz, 2018 UT App 14 (Toomey).** As Aziz was being removed from a bar by a bouncer, Aziz bit the bouncer's cheek, removing a quarter-sized piece of flesh. At the preliminary hearing, Aziz's friend testified without a translator, but at trial, he used a court-appointed Arabic translator. Aziz argued on appeal that counsel was ineffective for not objecting to alleged inaccuracies in the translation. But trial counsel did not speak Arabic, and neither Aziz nor his friend, who spoke both Arabic and English, indicated there was any problem. Plus, the friend never saw the bite, and his trial testimony as presented through the translator was consistent with the friend's preliminary hearing testimony. So counsel was not ineffective.

**A defendant cannot prove prejudice on allegedly erroneous jury instructions where the evidence overwhelmingly shows that the result would have been the same had the instructions been altered.**
State v. Parkinson, 2018 UT App 62 (Orme). Parkinson was on parole when he was pulled over for a traffic violation. During the stop, Parkinson fled and ran over two officers. He was charged with evading and assault against a peace officer. He claimed that his counsel was ineffective for submitting jury instructions that omitted some mental state elements. He could not prove prejudice from any error because the evidence overwhelmingly showed the necessary mental states.

**Conflict-of-interest and failure-to-object claims under the Sixth Amendment must be based on facts, not speculation.**
State v. Gonzales-Bejarano, 2018 UT App 60 (Christensen). Gonzales was driving a stolen car with his girlfriend. They were arrested, and police found a bunch of stuff—IDs belonging to others, financial transaction cards—including a big load of meth. The same counsel represented Gonzales and his girlfriend. On appeal, Gonzales claimed that his attorney had a conflict of interest from the concurrent representation, but did not provide any concrete evidence—only speculation. This was not enough to show an actual conflict of interest that affected counsel's performance. Gonzales also argued that his counsel was ineffective for not arguing that some officer testimony was hearsay and/or violated his confrontation rights. But Gonzales did not prove that the declarants would not have actually been able to testify, and speculating that they would not have did not meet his burden.

**Counsel is ineffective for not moving for a directed verdict on financial transaction cards offenses where there was no evidence that the defendant intended to use the cards in violation of the act, rather than for some other purpose (whether legal or illegal).**
State v. Gonzales-Bejarano, 2018 UT App 60 (Christensen). Gonzales was driving a stolen car with his girlfriend. They were arrested, and police found a bunch of stuff—IDs belonging to others, financial transaction cards—including a big load of meth. The jury instruction stated that Gonzales was guilty if the State proved that he intended to use the FTCs "unlawfully," but the statute requires that the use be "in violation of" the FTC statute. Because there was no evidence of this specific intent (rather than intent to barter with or return the cards), counsel was ineffective.

## SIXTH AMENDMENT – SPEEDY TRIAL

**A one-year gap between charging and trial is not presumptively dilatory for a first-degree felony case.**
Zaragoza v. State, 2017 UT App 215 (Harris). Zaragoza beat his wife with a baseball bat for two hours in a motel room. After losing at trial and on appeal, Zaragoza filed a post-conviction petition arguing that his appellate counsel were ineffective for not raising a speedy trial claim. But the one-year gap between charging and trial was within the range of customary

promptness for a case involving a first-degree felony.

## SIXTH AMENDMENT—PUBLIC TRIAL

**When a public trial violation is based on exclusion of the public from jury selection and raised in the context of ineffective assistance, prejudice is not presumed, but the defendant must prove Strickland prejudice.**

**Weaver v. Massachusetts, 16-240 (Kennedy).** By a 6-2 vote, the Court held that petitioner, whose counsel performed deficiently by failing to object when his trial was closed to the public for two days of the jury selection process, could not show that he was prejudiced by his counsel's deficient performance — even though the underlying constitutional violation (courtroom closure) is considered a structural error (*i.e.*, an error not subject to harmless-error review). Petitioner contended that prejudice should be presumed under *Strickland* whenever the deficient performance is failure to preserve or raise a structural error. The Court disagreed, explaining that errors have been deemed structural for at least three broad reasons: (1) because the right protects an interest other than "to protect the defendant from erroneous conviction"; (2) because "the effects of the error are simply too hard to measure"; and (3) because "the error always results in fundamental unfairness." The Court held that even assuming structural errors in the final category are presumptively prejudicial under *Strickland*, the public-trial right does not fall within that category because "not every public-trial violation will in fact lead to a fundamentally unfair trial." Finally, the Court found that petitioner failed to show actual *Strickland* prejudice (*i.e.*, "a reasonable probability that the jury would not have convicted him if his attorney had objected to the closure") or a fundamentally unfair trial.

## SIXTH AMENDMENT—JURY TRIAL

**An affidavit signed by a juror stating that race played a role in sentencing was sufficient to establish clear and convincing evidence under rule 60(b) to contradict an earlier ruling.**

**Tharpe v. Sellers, 17-6075 (per curiam).** By a 6-3 vote, the Court summarily reversed an Eleventh Circuit decision that had denied a death row inmate's (Tharpe's) Rule 60(b) motion to reopen his federal habeas case based on affidavit signed by a juror indicating that Tharpe's race played a part in the jury's sentencing decision. The juror's affidavit stated, among other things, his view that "there are two types of black people: 1. Black folks and 2. Niggers"; that Tharpe, "who wasn't in the 'good' black folks category in my book, should get the electric chair for what he did"; and "[a]fter studying the Bible, I have wondered if black people even have souls." A state court found that the juror's vote to impose the death penalty was not based on Tharpe's race. The federal district court denied Tharpe's Rule 60(b) motion on the ground, among others, that he failed to produce clear and convincing evidence contradicting the state court's determination. The Eleventh Circuit denied a certificate of appealability. Vacating that decision, the Supreme Court held that the juror's "remarkable affidavit—which he has never retracted—presents a strong factual basis for the argument that Tharpe's race affected [the juror's] vote for a death verdict." The Court remanded to allow the lower courts to address whether Tharpe

has satisfied the other requirements for Rule 60(b) relief.

**In theft cases, the trial court can rule as a matter of law that a contract or statute authorized control over the property, but only if the language is unambiguous. But the court cannot rule as a matter of law that an element of the offense (unauthorized control) is established.**
State v. Bruun & Diderickson, 2017 UT App 182 (Roth). Bruun & Diderickson entered into an agreement with the victims to purchase their property and form an LLC with the victims to develop it. A different LLC that Bruun & Diderickson had an ownership interest in was the managing member of the LLC formed with the victims. Bruun & Diderickson convinced the victims to let the LLC take out a hard money loan using the property as collateral. Bruun & Diderickson spent some of that money on developments unrelated to the property. They were convicted of several counts of theft and pattern of unlawful activity. They argued on appeal that under the terms of the operating agreement or the LLC Act, the managing member was authorized to use the money however it saw fit and the court should have instructed the jury on that as a matter of law. But the agreement and statue were ambiguous at least, so the issue presented a question of fact to be sent to the jury. Alternatively, the agreement and statute unambiguously did *not* authorize control of the funds in the way Bruun & Diderickson argued. But instructing the jury to that effect would take away the defendants' right to a trial by jury.

## STATUTE OF LIMITATIONS

**An officer's suspicion that a defendant's living with a minor could mean that some sexual offense was being committed did not constitute a "report of the offense" under *State v. Green*, and the statute of limitations did not run before it was extended indefinitely.**
McCamey v. State, 2017 UT App 97 (per curiam). McCamey pled guilty to various sex offenses regarding a teenager with whom he lived. In postconviction, he claimed that his counsel was ineffective for not asserting a statute of limitations defense because an officer had asked another police agency to look into McCamey's living with a teenager. Under the Utah Supreme Court's decision in *State v. Green*, a "report of the offense" sufficient to trigger the running of the then-applicable statute of limitations required a level of detail that the officer here did not convey. Because this was not a report of the offense, and the statute of limitations for these offenses was later eliminated, the charges were timely, and counsel was not ineffective for not filing a futile motion to dismiss based on a statute of limitations defense.

## SUFFICIENCY OF THE EVIDENCE

**A defendant's admission that he "doe[s] a lot of cocaine like, sometimes," is sufficient to prove that he was an unlawful user of a controlled substance at the time he possessed a gun.**
State v. Garcia, 2017 UT 53 (Pearce). Garcia got mad at his cousin and did a drive-by shooting at his cousin's house. Garcia was charged with attempted murder and unlawful possession of a firearm based on his being an unlawful user of a controlled substance. When he was arrested, Garcia told police that he "doe[s] a lot of cocaine like, sometimes." Garcia argued at trial that

this admission was not sufficient to show that he was an unlawful user; the supreme court disagreed, because the admission was in the present tense, not the past tense.

**A stick can be a dangerous weapon, and juries have a broad range within which to decide the seriousness of an injury.**
**State v. Yazzie, 2017 UT App 138 (Roth).** Yazzie and the victim got drunk and fought. Yazzie attacked the victim repeatedly, hitting her on the back with a hammer or stick, biting her cheek, and hitting her mouth so hard that it drove her teeth through her lower lip. She was covered in blood and hurt all over her body. Yazzie was convicted of, among other things, aggravated assault, and challenged the sufficiency of the evidence on the alternative theories of whether (1) he used a dangerous weapon or (2) whether he used other means or force likely to cause death or serious bodily injury. Even assuming that the object was a stick rather than a hammer, its manner of use showed that the jury could find that it was a dangerous weapon. And given the extent of the victim's injuries and pain, the jury could find that Yazzie used other force or means likely to cause death or serious bodily injury, even if neither actually resulted.

**When a victim's testimony is consistent with findings of both penetration and non-penetration in an object rape case, the evidence is sufficient because the jury can reasonably draw an inference of penetration.**
**State v. Patterson, 2017 UT App 194 (Christensen).** Victim said that Patterson put his hands down her pants and separated her labia and that it "really hurt." Because this testimony could reasonably be understood to support penetration, the evidence was sufficient on that element.

**Victim testimony and a video showing part of the defendant's sexual abuse of a child was sufficient to convict.**
**State v. Carrell, 2018 UT App 21 (Harris).** Carrell drove a school bus for special needs children. Video aboard the bus showed him lingering over the victims and putting his hands on them. He claimed that the victim's testimony and the video were insufficient because the victims contradicted themselves and the video was ambiguous. Not so, said the court of appeals. The evidence and inferences were enough for a jury to convict, because the victims did not contradict themselves to the point of inherent unreliability, and the video could be seen in an inculpatory way.

**Evidence of multiple sexual acts, corroborated by multiple victims, is enough to establish an intent to arouse or gratify. Contradictory evidence, inconsistencies unrelated to the charged offense, and allegations of fabrication are not enough to make the evidence inconclusive or inherently improbable.**
**State v. Garcia-Mejia, 2017 UT App 129 (Mortensen).** Garcia-Mejia was convicted of aggravated sexual abuse of a child and sodomy on a child for abusing five of his six children. While in his bed or in the shower with his children, he would put his penis on or between their buttocks, or he would put his hand down their pants or remove their underwear and touch their penises while moving his hand. That was enough to show that Garcia-Mejia acted with intent to arouse or gratify his sexual desire. Corroborated testimony about a single instance of

sodomy was sufficient to show that he acted intentionally—despite Garcia-Mejia's contradictory testimony, inconsistencies in the children's accounts that did not relate to the sodomy, the children's failure to report the abuse earlier, and allegations of fabrication.

**Fingerprint evidence should be considered the same as any circumstantial evidence, with the factfinder determining how much weight to give it; no different standard applies to determine whether fingerprint evidence is sufficient to sustain a conviction.**
**State v. Cowlishaw, 2017 UT App 181 (Toomey).** Cowlishaw stole a car, talked an acquaintance into going for a ride with him, then refused to take her home. After driving around for 6 hours, Cowlishaw fled from police, crashed the car, then escaped on foot, leaving his captive behind. At trial, the acquaintance never specifically identified Cowlishaw, and the car owner never explicitly said, "That's my car." But everything about the acquaintance's and car owner's testimony tied Cowlishaw to the crimes. Plus, his fingerprints were on the car.

**An adult man exposing his genitals to a newspaper delivery boy on his front porch is likely to cause affront or alarm.**
**State v. Miller, 2017 UT App 171 (Toomey).** Miller was convicted of lewdness involving a child after he came outside wearing only a shirt, with his genitals partially exposed, to accept a newspaper from a 12-year-old newspaper delivery boy. The court held that, even assuming a front porch is a private place, Miller should have known that his actions were likely to cause affront or alarm.

**Evidence was sufficient to disprove self-defense when mother was grabbing her adult daughter's arm to bring her inside to get a coat.**
**State v. Minter, 2017 UT App 180 (per curiam).** Minter was walking home from a bar when she saw a woman arguing with her mother and brother. The brother held a machete, which he had been using to chase off his sister's boyfriend. The mother was insisting that her daughter come inside to get a coat, and when she grabbed her daughter's arm, Minter intervened and struck the mother in the face. The evidence was sufficient for the jury to find that Minter did not reasonably believe that force was necessary to defend herself or the daughter.

**A witness's cooperation agreement, drug use during the events she testifies about, and failure to see every aspect of a drug transaction do not make the witness's testimony inherently improbable.**
**State v. Rust, 2017 UT App 176 (Roth).** Rust was convicted of money laundering, conspiracy to distributed drugs, and filing a false tax return. Rust argued that the evidence was insufficient because a witness's testimony was inherently improbable due to a cooperation agreement, her drug use at the time of the events she observed, and the fact that she never saw the actual exchange of drugs. But that all went to the weight of her testimony. And because the evidence was sufficient to prove conspiracy to distribute drugs, it was sufficient to prove that Rust knew the money he was hiding came from illegal activity and that he did not include that money on his tax returns.

**Accelerating through a red light at freeway speeds, without pressing on the break or taking evasive action, supports a finding of depraved indifference. And evidence that a defendant was able to carry on coherent conversations and control his vehicle is sufficient to disprove voluntary intoxication.**

State v. Thompson, 2017 UT App 183 (Toomey). Thompson's wife woke him from a drunken slumber and confronted him about his drinking and about several sexually explicit text messages he sent to another woman just two hours earlier. Thompson became enraged, and when the fight moved outside, Thompson beat or threatened anyone who tried to intervene. Thompson then got in his full-sized pickup truck and sped off. As he came to a busy intersection with a red light, Thompson pushed the gas pedal to the floor and drove into the intersection at over 60 mph, hitting several cars, injuring several people, and killing one woman. Along with evidence that Thompson did not take any evasive measures, that was sufficient to support a finding of depraved indifference. And the coherent text messages and evidence of Thompson's driving pattern leading up to the crash was sufficient to rebut a voluntary intoxication defense and show that Thompson acted knowingly.

**To determine whether a defendant killed while knowingly creating a great risk of death to a third party, courts should consider any relevant facts, including proximity, threats toward the third party, and the temporal relationship between those threats and the killing.**

State v. Sosa-Hurtado, 2018 UT App 35 (Harris). Sosa-Hurtado shot at the owner of a smoke shop and then killed the owner's son because the son had beat him in a fistfight. The owner was five to seven feet away from his son and Sosa-Hurtado when Sosa-Hurtado shot the son three times with a high-powered rifle. Sosa-Hurtado argued that the evidence was insufficient to show that he knowingly created a great risk of death to the owner—an aggravating factor that made the offense aggravated murder. The court rejected the argument, looking at the spatial proximity of all three people, Sosa-Hurtado's attempt to shoot the owner, and the brief interval between that attempt and the killing.

**Competing testimony that undermines a witness's credibility is for the jury to weigh; it does not make the testimony apparently false. Internal inconsistencies are relevant only to the review of a motion to arrest judgment.**

State v. Cady, 2018 UT App 8 (Mortensen). Cady was convicted of object rape. The victim said "unh-unh," shook her head, pushed Cady's his hand away, tried to hold her pants up, pushed against Cady with her arm and leg, curled up in ball facing away from Cady, and cried the whole time. Cady admitted that her body language was indecisive and that indecisive body language means "no." The evidence was sufficient to prove non-consent and Cady's recklessness as to consent. Aspects of the victim's and others' testimony that undermined her story did not make it apparently false. And internal inconsistencies were irrelevant to the sufficiency challenge.

## UTAH CONSTITUTION—DUE PROCESS

**A destruction of evidence claim under the State Due Process Clause requires the defendant to make a threshold showing that the evidence has a reasonable probability of being exculpatory.**
State v. DeJesus, 2017 UT 22 (Durrant). DeJesus—an inmate—got into a fight with another inmate. When a corrections officer tried to break them up, DeJesus kicked him. She was charged with assaulting an officer. Though there was video surveillance footage of the altercation, it was recorded over after a prison guard failed to preserve it. To show a State due process violation under *State v. Tiedemann*, the defendant first needs to show a reasonable likelihood that the destroyed evidence was exculpatory. This is a relatively low bar—the defendant need merely proffer something about what the evidence could reasonably show and how this would benefit her case. DeJesus met that burden by having other inmates testify about what happened (even though this contradicted what the corrections officer testified). Given the importance of the footage to the case, dismissal was warranted, even though the State did not act in bad faith.

**The threshold showing of exculpatoriness cannot be met by speculation.**
State v. Mohamud, 2017 UT 23 (Durrant). A companion case to DeJesus, with much of the same analysis. Mohamud was convicting of possessing a shank in prison, and argued that the loss of some prison surveillance footage prejudiced him, but he did not testify and called no witnesses. Thus, his claims were speculative, which cannot meet the threshold burden under *Tiedemann*.

## UTAH CONSTITUTION—RIGHT TO APPEAL

**The plea-withdrawal statute does not violate the state constitutional right to an appeal because it simply narrows the issues that may be raised on appeal using a rule of preservation and waiver.**
State v. Rettig, 2017 UT 83 (Lee). Rettig pleaded guilty to aggravated murder and aggravated kidnapping. He sent a pro se letter to the court asking to withdraw the plea and complaining about counsel. He got new counsel, and that counsel withdrew the request to withdraw the plea. Rettig appealed, arguing that his plea was unknowing and involuntary and that he received ineffective assistance of counsel in deciding to plea and deciding to withdraw the request to withdraw his plea. Because the plea withdrawal statute limits appellate jurisdiction to cases where defendants move to withdraw the plea before sentencing, Rettig argued that the statute deprived him of a right to appeal. The court rejected the argument because the plea withdrawal statute simply limits the issues that may be raised on appeal. It sets a preservation rule, not subject to any exceptions, and imposes a consequence—waiver of the right to challenge the plea.

## UTAH CONSTITUTION—UNANIMOUS VERDICT

**The Unanimous Verdicts Clause of the Utah Constitution does not require unanimity on alternate factual theories—only on elements of the offense. Where there are alternate ways to meet a single element, the jury members don't have to choose between them.**
State v. Hummel, 2017 UT 19 (Lee). Hummel had the public defender contract for Garfield County. Though he was required to represent indigent defendants under that contract, he convinced a number of them to retain him instead, providing the same services, but getting paid more for them. He was charged with four counts of theft and one count of attempted theft. The prosecution's theory was that he had committed either theft by deception or theft by extortion. The verdict form did not ask the jury to specify which theory it believed. Held: the Unanimous Verdicts clause does not require unanimity on theories of a crime, only on elements. Because all theft is the same crime, the jury does not have to specify which variant of theft it believes, so long as the elements (unauthorized control, intent to deprive) are met.

## UTAH CONSTITUTION—UNIFORM OPERATION OF LAWS

**The DUI metabolite statute does not require impairment.**
State v. Outzen, 2017 UT 30 (Durrant). Outzen smoked marijuana, then drove. He fell asleep at the wheel and caused a crash. He was charged under the DUI metabolite statute (Utah Code 41-6a-517). Outzen argued that because it did not require impairment, the statute was an unconstitutional status offense under the Eighth Amendment and also violated the Uniform Operation of Laws Clause of the State Constitution. The Supreme Court disagreed. On the Uniform Operation claim, the Court held that the Legislature rationally distinguished between unlawful users and lawful/unwitting users in order to deter illegal drug use and promote public safety.

**The measurable-amount statute that makes killing someone while driving with any measurable amount of a Schedule I or II controlled substance does not violate the Uniform Operation of Laws Clause.**
State v. Ainsworth, 2017 UT 60 (Lee). On Christmas Eve, Ainsworth drove his Suburban over the median and hit a family head-on; the parents and their 3-year-old child were injured; their 18-month-old was killed. Ainsworth had meth in his system. He was convicted of causing death while driving with a measurable amount of a Schedule II controlled substance in his body, a second-degree felony (Utah Code 58-37-2). Ainsworth argued that the statute violated the Uniform Operation of Laws Clause because causing death when driving while impaired is a third-degree felony (Utah Code 41-6a-502), and he argued that there was no rational basis for punishing non-impaired driving more harshly. But the legislature can rationally decide that use of Schedule I and II substances is more culpable than other substances, even without a showing of impairment. *Shondel* did not present a problem because it applies only when two statutes are "wholly duplicative" and when they both have the same effective date.

**The aggravated murder sentencing scheme does not violate due process, equal protection, or the uniform operation of laws clause.**

**State v. Reyos, 2017 UT App 132 (Toomey).** Reyos killed a sixteen-year-old boy, was convicted of aggravated murder, and was sentenced to life without parole. Reyos challenged the constitutionality of the aggravated murder sentencing scheme, arguing that the way the capital and non-capital sentencing statutes worked together made the whole scheme unconstitutional, particularly in treating capital defendants more favorably by giving them a jury. The court of appeals rejected Reyos's arguments, reaffirming that the aggravated murder sentencing scheme does not violate due process, equal protection, or the uniform operation of laws clause.

## UTAH CONSTITUTION—SEPARATION OF POWERS

**The plea-withdrawal statute requirement that untimely challenges to pleas be raised in post-conviction is not a procedural rule and thus does not violate the constitutional limits on legislative procedural rules.**

**State v. Rettig, 2017 UT 83 (Lee).** Rettig pleaded guilty to aggravated murder and aggravated kidnapping. He sent a pro se letter to the court asking to withdraw the plea and complaining about counsel. He got new counsel, and that counsel withdrew the request to withdraw the plea. Rettig appealed, arguing that his plea was unknowing and involuntary and that he received ineffective assistance of counsel in deciding to plea and deciding to withdraw the request to withdraw his plea. Rettig argued that the plea withdrawal statute's requirement that untimely challenges to the plea must be pursued in post-conviction violated the constitutional restriction on the legislature's authority to impose procedural rules. The court held that this aspect of the statute was not procedural.